No. 86-825

In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY JONES
SPECIALIST FOUR, UNITED STATES ARMY,

BRYON K. WARE
SPECIALIST FOUR, UNITED STATES ARMY,
PETITIONERS

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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WHP

QUESTION PRESENTED

WHETHER the actions of the military commander who ordered petitioners' trials and who was motivated by a personal desire to purify the Army of soldiers whom he deemed undesirable and to stigmatize them with punitive discharges without due process of law, contrary to longstanding and emphatic Congressional intent, have such a deleterious effect on military justice that reversal of petitioners' convictions is required to give meaningful effect to Congressional intent, ensure public confidence in the fairness of military justice, and properly and adequately maintain military discipline and readiness.

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The petitioners, Gregory Jones and Byron K. Ware, respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW

The Court of Military Appeals summarily affirmed petitioners' convictions on the basis of its holding in *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) (Appendix A). *United States v. Jones*, ____ M.J. ____, Dkt. No. 54148 (C.M.A. Sep. 24, 1986) (summary disposition) (Appendix B); *United States v. Ware*, ____ M.J. ____, Dkt. No. 54181 (C.M.A. Sep. 24, 1986) (summary disposition) (Appendix C). The opinions of the United States Army Court of Military Review are unpublished. *United States v. Jones*, CM 445367 (A.C.M.R. Jan. 8, 1985) (sentence set aside and rehearing ordered) (Appendix D), *aff'd*, CM 445367 (A.C.M.R. Nov. 12, 1985) (Appendix E);

United States v. Ware, SPCM 19606 (A.C.M.R. Feb. 8, 1985) (action of convening authority set aside and new review and action ordered) (Appendix F), *aff'd* SPCM 19606 (A.C.M.R. Dec. 16, 1985) (Appendix G).

JURISDICTION

The judgments of the Court of Military Appeals were entered on September 24, 1986, affirming petitioners' convictions. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. II. 1984).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

The Uniform Code of Military Justice provides:

Article 37, 10 U.S.C. § 837, Unlawfully influencing action of court.

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to

statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

Article 98, 10 U.S.C. § 898, Noncompliance with procedural rules.

Any person subject to this chapter who-

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.

Statement of the Case

On October 4, 1983, Major General (MG) Thurman E. Anderson, the commanding general of Third Armored Division, ordered petitioner Jones' trial by general court-martial on an original charge. On November 23, 1983, MG Anderson ordered that additional charges be tried with the original charge. On November 29, 1983, a bench trial before a military judge commenced at Butzbach, Federal Republic of Germany. The court-martial invoked jurisdiction pursuant to Article 2, Uniform Code of Military Justice [hereinafter cited

as UCMJ], 10 U.S.C. § 802 (1982). Pursuant to petitioner's pleas of guilty, the court entered findings of guilty to allegations of disobedience of a superior noncommissioned officer, aggravated assault, wrongful possession of marijuana with intent to distribute, wrongful distribution of marijuana, and communication of a threat, in violation of Articles 91, 128, and 134, UCMJ, 10 U.S.C. §§ 891, 928 and 934. The court sentenced petitioner to a dishonorable discharge, confinement for ten years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Pursuant to a pretrial agreement, MG Anderson suspended the confinement in excess of four years.

Petitioner urged the United States Army Court of Military Review, pursuant to its authority under Article 66, UCMJ, 10 U.S.C. § 866, to reverse his conviction due to the unlawful command actions of MG Anderson within the Third Armored Division at the time of petitioner's trial. *United States v. Jones*, CM 445367 (A.C.M.R. Jan. 8, 1985) (unpub.) (Appendix D). Presuming only that petitioner was prejudiced because no witnesses testified on his behalf during the sentencing phase of his trial,[1] the Army Court affirmed the findings of guilty, set aside the sentence, and authorized a rehearing on the sentence. *Id.*

On March 4, 1985, a rehearing on sentence was held before a military judge sitting as a general court-martial at Fort Leavenworth, Kansas. The court sentenced petitioner to a dishonorable discharge, confinement for 30 months, and reduction to the lowest enlisted grade. A different commanding general approved the sentence. On November 12, 1985, the United States Army Court of Military Review affirmed the sentence. *United States v. Jones*, CM 445366 (A.C.M.R. Nov. 12, 1985) (unpub.) (Appendix E).

On June 17, 1986, the United States Court of Military Appeals granted review of the following issue petitioner presented:

> Whether an appellate finding of unlawful command influence mandates reversal of the findings and sentence without particularized prejudice to an accused.

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[1] A court-martial is a bifurcated proceeding, including a guilt/innocence phase and a sentencing phase during which the accused may call witnesses.

22 M.J. 355 (C.M.A. 1986). In light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) (Appendix A), the court concluded that the command influence within the Third Armored Division did not prejudice petitioner. Accordingly, the court affirmed the decision of the United States Army Court of Military Review. *United States v. Jones*, ____ M.J. ____, Dkt. No. 54148 (C.M.A. Sep. 24, 1986) (Appendix B)

On April 6, 1983, MG Anderson ordered petitioner Ware's trial by special court-martial empowered to adjudge a bad conduct discharge. On April 20, 1983, a bench trial before a military judge commenced at Frankfurt, Federal Republic of Germany. The court-martial invoked jurisdiction pursuant to Article 2, UCMJ, 10 U.S.C. § 802. Pursuant to petitioner's pleas of guilty, the court entered findings of guilty to allegations of violating a lawful general regulation prohibiting blackmarket activities and soliciting others to disobey the regulation, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892 and 934. The court sentenced petitioner to a bad conduct discharge, confinement for two months, forfeiture of $382.00 pay per month for two months, reduction to the lowest enlisted grade, and a fine of $600.00. Major General Anderson approved the sentence except for the fine of $600.00. On February 8, 1985, the United States Army Court of Military Review held that the trial proceedings were untainted by MG Anderson's unlawful command influence but that MG Anderson had disqualified himself as a reviewing authority. *United States v. Ware*, SPCM 19606 (A.C.M.R. Feb. 8, 1985) (unpub.) (Appendix F). Accordingly, the Army Court set aside MG Anderson's approval of petitioner's sentence and ordered a new review of the sentence by a different commanding general. *Id.* A different commander approved the sentence except for the fine of $600.00. On December 16, 1985, the United States Army Court of Military Review affirmed the findings and sentence. *United States v. Ware*, SPCM 19606 (A.C.M.R. Dec. 16, 1985) (unpub.) (Appendix G).

On June 17, 1986, the United States Court of Military Appeals granted review on the following issue specified by the court:

> Whether an appellate finding of command influence warrants reversal where there is no showing of particularized prejudice to appellant.

22 M.J. 355 (C.M.A. 1986). In light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986) (Appendix A), the court concluded that the unlawful command influence within the Third Armored Division did not prejudice petitioner. Accordingly, the court affirmed the decision of the United States Army Court of Military Review. *United States v. Ware*, ____ M.J.____, Dkt. No. 54181 (C.M.A. Sep. 24, 1986) (Appendix C).

The question presented in this petition has therefore been fully litigated at every stage of the appellate process in both cases. The issue addressed by the United States Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WERE THE REMEDIAL ACTIONS TAKEN BY THE COURT OF MILITARY REVIEW APPROPRIATE AND ADEQUATE, UNDER THE CIRCUMSTANCES OF EACH CASE, TO ELIMINATE THE PREJUDICIAL IMPACT OF UNLAWFUL COMMAND INFLUENCE FOUND TO HAVE BEEN EXERCISED WITHIN THE THIRD ARMORED DIVISION, OR DID GENERAL ANDERSON'S COMMENTS HAVE SUCH A DELETERIOUS EFFECT ON THE JUDICIAL PROCESS THAT EVEN MORE DRASTIC ACTION, SUCH AS AUTOMATIC REVERSAL OF THE FINDINGS AND SENTENCE, IS REQUIRED?

United States v. Thomas, 22 M.J. at 393.

The extensive litigation, in some 230 cases, on the issue of improper command influence within the Third Armored Division (headquartered in Frankfurt, Federal Republic of Germany) before the lower military courts has resulted in a relevant and critical finding, *to wit*: there was *in fact* an exercise of unlawful command influence within the Third Armored Division by MG Anderson while he was in command from February 19, 1982 until March 1, 1984. As the commander, MG Anderson was the convening authority for all

general courts-martial and special courts-martial empowered to adjudge a bad conduct discharge.[2] Major General Anderson had an intense interest in and zealous concern with military justice. He was critical of and frustrated with the operation of the military justice system within the Third Armored Division.[3] It is the manifestations of his frustrations and zealousness that established the factual predicate for the finding of improper command influence.

Between April and December 1982, MG Anderson lectured at approximately ten meetings with his subordinate commanders and senior noncommissioned officers.[4] At these meetings MG Anderson spoke on the subject of testifying on behalf of accused soldiers at courts-martial, *i.e.*, to direct how his subordinates should perform their military justice duties. There was a recurrent theme at these lectures. He stressed the "inconsistency" of commanders who testify as character witnesses on behalf of an accused soldier and who opine that such a soldier should be retained in the service *after* the same commanders had recommended the accused's trial by a court-martial empowered to adjudge a punitive discharge.

More than fifty witnesses testified in *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985), *aff'd*, 22 M.J. 388 (C.M.A. 1986), as to their recollections of MG Anderson's message at the various meetings they attended.[5] Most of

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[2] *See* Articles 22 and 23, UCMJ, 10 U.S.C. §§822 and 823.

[3] United States v. Treakle, 18 M.J. 662 (A.C.M.R.) (*en banc*) (Cohen, J., concurring), *remanded*, ___ M.J. ___ (C.M.A. 1986).

[4] "These lectures were given at meetings held at different levels of command and at various locations throughout his division, and the audience varied. Sometimes, only commanders were in attendance, and at other times only senior noncommissioned officers. At still other times there was a mix between officers and noncommissioned officers." *Treakle*, 18 M.J. at 663 (Yawn, J., concurring in part and dissenting in part).

[5] The record of trial in *Giarratano* was extensively used in the Third Armored Division litigation. At the trial level military judges "judicially noted" its findings in subsequent cases. At the appellate level it was admitted as an appellate exhibit in petitioners' cases. Because it is the most complete inquiry into the nature and scope of command influence in the Third Armored Division, all references to a record and appellate exhibits will be to *Giarratano*.

these witnesses agreed that MG Anderson was displeased over favorable testimony on behalf of an accused soldier by commissioned and noncommissioned officers after he had ordered the trial. The overwhelming recollection was that MG Anderson espoused, in no uncertain terms, a "don't testify" policy.[6] Some understood MG Anderson's remarks as

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[6] *See* affidavits and testimony of: First Sergeant Robert L. Carr, R. 70, 86, 96 ("I felt that it was . . . General Anderson's feelings, that he did not want us testifying for an accused soldier" R. 96); Captain (CPT) John F. Day, R. 124-25 ("What I understood . . . one would not refer somebody for a court-martial and then also act, for instance, as a favorable witness for the defense in either the actual trial or extenuation and mitigation."); Sergeant First Class Warren T. Forkin, Appellate Exhibit XCIV ("[MG Anderson] definitely indicated to us that as NCO's we would support his command and that we would not go up and testify on behalf of a soldier the chain of command had put up for a court-marital."); CPT James R. Frickle, R. 578-79, 596 ("[MG Anderson could not believe that a commander would press charges and then go back and testify for the accused . . . . As he got into that topic, you could see his anger; or you could feel [h]is anger, as his voice was increasing . . . ."); CPT Richard P. Gebhardt, R. 651, 653 ("When [MG Anderson] came in the meeting he was upset, visibly upset . . . he made a statement that he was tired of officers and noncommissioned officers preferring charges against soldiers . . . and then giving testimony as to their good character . . . . I was a little bit astonished. I couldn't quite believe that a 2-star general would be saying something like that . . . . Well, to me – he didn't actually ask me to lie, but he was asking me, I believe, to suppress the truth. . . . But . . . there wasn't any other way to interpret it."); Command Sergeant Major (CSM) George C. Hogan, R. 439, 474 ("[D]o not testify on behalf of a soldier in your same chain of command, particularly if your commander has preferred charges" R. 439.); CSM Robert E. Jones, R. 699, 700-01 ("[MG Anderson] indicated to us that noncommissioned officers should not testify or be a witness for a soldier that's being court-martialed and say things about the soldier . . . . I perceived it that, if you did speak to someone about that, you would probably get in trouble somewhere . . . . The division would probably come down on you."); CPT Steven E. Miller, Appellate Exhibit LXXXV ("He also indicated something to the effect that good soldiers don't get into trouble and how could someone testify for a bad soldier . . . . The bottom line understanding from these comments was that a chain-of-command does not testify at Extenuation and Mitigation when the chain-of-command preferred charges . . . . [A] chain-of-command, if they testify, owes its responsibility to the Army and not the individual soldier . . . . I took his comments to be directed at me as policy, and that he was trying to directly influence me on whether I'd go to trial on behalf of one of my soldiers."); 1SG Robert T. McCrimmon,

a warning that if they dared to contravene this policy, repercussions would follow (R. 304-305, 318). The impression made upon MG Anderson's audience was further enhanced by his displays of anger at the meetings (R. 305, 399, 409-410, 440, 577, 579, 651, 713, 716, 776, 783, 811). On occasion, he expressed his feeling over testimony that he considered ill-advised as testimony that "really pisses me off" (R. 783, 898-899, 1214).

Specific incidents evidence that MG Anderson was driven by an adamant personal desire to "purify" the Army of undesirable soldiers (R. 352-353). At one meeting, MG Anderson stated that noncommissioned officers "had a moral obligation to the service to weed out the undesirable, and put them out of the service" (R. 509). Furthermore, he did much more than espouse a "purification" policy. Several incidents evidence the extent to which MG Anderson ensured that his policy was carried out.

In one case, after a noncommissioned officer, Sergeant Wright, was charged with driving under the influence of alcohol and leaving the scene of an accident, MG Anderson made an unannounced visit to the sergeant's unit. Confronting the unit first sergeant, MG Anderson demanded: "Let's talk about this f----- you got called Sergeant Wright" (R. 1078). Apparently very upset over the incident, MG Anderson refused to listen to any explanation (R. 1079-80). In another case, a soldier's name appeared on the military police blotter.[7] The soldier's command sergeant major answered the unit telephone and was confronted by an angry MG Anderson who fired a series of suggestive and rhetorical questions indicating that the soldier should have been reduced in rank

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R. 410, Appellate Exhibit XXIII, p.83 (MG Anderson stated "[t]hat he couldn't understand how senior enlisted and officers could go in and testify for a person who was charged, I think, with rape or drugs, and that it was unprofessional to do that" R. 410); 1SG Obie L. Spratling, R. 1165 ("[MG Anderson] said it was your duty as a professional soldier to not go to court and say this guy is a good soldier when you know he's convicted of several crimes."); CPT Andrew Shattuck, Appellate Exhibit XCV ("His [MG Anderson's] tone of voice and speech made it obvious that favorable testimony on behalf of a convicted soldier really made him angry.").

[7] A military police blotter is a daily journal of police activities that is distributed to commanders throughout a division.

(R. 446). When the battalion commander returned MG Anderson's call to explain the mitigating circumstances in the soldier's case, he was unable to get MG Anderson to listen and the conversation was reduced to a "yes, sir, no sir, type thing, and that was it" (R. 450).

A third incident demonstrates the direct coercion with which MG Anderson's policy was enforced. The military police battalion commander of several units located primarily within MG Anderson's jurisdiction had testified on behalf of two accused soldiers. After the court-martial of one of the soldiers, in March 1982, the battalion commander was contacted by MG Anderson's legal advisor who said "MG Anderson was upset that [the soldier] had been retained and had not been immediately reclassified" (Affidavit of LTC Mueller, Defense Appellate Exhibit L, p.2). At the court-martial of the second soldier, the battalion commander recommended that the soldier be retained in the service and the court-martial subsequently did not adjudge a punitive discharge. The battalion commander received another call from MG Anderson's legal advisor informing him that MG Anderson had read the record and was upset with his testimony (*id*). It was the conclusion of that battalion commander that it was the policy within the Third Armored Division that commanders who recommended a special or general court-martial *automatically* concluded the accused soldier was guilty *and* should be given the maximum punishment allowed by a court-martial" (*id.*).

The inculcation of MG Anderson's policy was not limited to his own lectures and the actions of his legal advisor. His message was further disseminated throughout the Third Armored Division by the division command sergeant major, who had the responsibility of articulating established command policies and standards, by way of a policy letter (NCOPP letter #16, dated January 25, 1983). In this letter, noncommissioned officers were told *not* to "[s]tand before a court-martial jury . . . and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty" (*id.*) The command sergeant major expressed the same message to his

subordinates at a number of seminars (R. 233, 249-250, 306, 524-525, 1238, 1298). His letter and lectures were widely perceived as reiterating MG Anderson's message (R. 93, 95-96, 306, 580, 701, 708, 1168, 1178; Appellate Exhibit LXXXV).

A second command sergeant major transmitted a disposition form wherein noncommissioned officers were reminded of their ethical duty to *refrain* from testifying on behalf of a "convicted" soldier (Appellate Exhibit IV). He further stated that "[i]f you personally cannot subscribe to this philosophy my friend, you need to leave the Army and find another occupation in life" (*id.*). This admonishment was perceived to be consistent with MG Anderson's views (R. 444, 470-471).

The military judge in *Giarratano* determined that MG Anderson's comments induced members of the Third Armored Division to believe:

> [T]hat the chain of command who prefers a case presumably believes the accused guilty; and two, that the extenuation and mitigation testimony made by an accused's chain of command is (A) not meaningful; (B) not credible; (C) should be ignored; and (D) once charged and convicted of a drug or sex offense, or other serious crime, the accused should be discharged. *Taken together these comments could reasonably cause an accused to be convicted quicker and the eventual sentence imposed to be greater.*

(R. 1440) (emphasis added). This same military judge characterized the situation in the Third Armored Division as an "egregious case of command influence" (R. 1445). Subsequently, the Army Court of Military Review also found that there existed unlawful command influence in the Third Armored Division, and ultimately concluded that MG Anderson's remarks influenced court members not only to disregard favorable character testimony presented on behalf of a convicted soldier, but also to discount any evidence inconsistent with the predetermination of an accused soldier's guilt

made by the convening authority and those commanders who recommended referral of the charges for trial.[8]

Attempts were made to retract MG Anderson's statements. In March and September 1983, MG Anderson disseminated two letters stating that a soldier had a duty to testify (Appellate Exhibit XIII, pages 4 and 10). The military judge in *Giarratano* found these "retraction" efforts to be an ineffective remedial action (R. 1444-45).

REASONS FOR GRANTING THE WRIT

Although the Court has been reluctant to extend its review of courts-martial convictions beyond the question of jurisdiction,[9] and has deferred to the expertise of the Court of Military Appeals,[10] it has acknowledged that courts-martial may not be "subjected to the uncontrolled will of any man, but . . . must be adjudged *according to law.*"[11] Furthermore, the Court has reviewed military questions that affect large

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[8] In the first case decided by the Army Court on the unlawful command influence issue, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (*en banc*), the court initially determined that MG Anderson's remarks merely discouraged favorable *character* testimony and did not affect other testimony favorable to the accused. *Id.* at 652-653, 658. Upon consideration of additional evidence presented to the court after the *Treakle* opinion, the Army Court found that the scope of unlawful command influence affected *all* favorable testimony on behalf of accused soldiers, both on the merits and during sentencing proceedings. *See* United States v. Mitchell, 19 M.J. 905, 907 (A.C.M.R. 1985).

[9] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857); Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1863); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Ex parte Reed, 100 U.S. 13, 23 (1879); Keyes v. United States, 109 U.S. 336, 340 (1883); Swain v. United States, 165 U.S. 553, 566 (1897); Carter v. McClaughry, 183 U.S. 365, 401 (1902); Reaves v. Ainsworth, 219 U.S. 296, 304 (1911); Hiatt v. Brown, 339 U.S. 103, 110-11 (1950); O'Callahan v. Parker, 395 U.S. 258 (1969); Relford v. Commandant, 401 U.S. 355 (1971); Schlesinger v. Councilman, 420 U.S. 738 (1975); United States v. Solorio, 21 M.J. 251 (C.M.A.), *cert. granted,* 106 S.Ct. 2914 (1986).

[10] Noyd v. Bond, 395 U.S. 683, 694-95 (1969).

[11] Runkle v. United States, 122 U.S. 543, 558 (1887) (Court's emphasis). Lower courts have described the question of unlawful command influence of courts-martial as a matter of fifth amendment due process. *E.g.*, Curry v. Secretary of Army, 595 F.2d 873 (D.C. Cir. 1979).

numbers of complainants[12] and has chosen to resolve questions of importance to the public.[13] Finally, the Court has been willing to ensure that Congress' intent controls the balance between the rights of servicemembers and the need for discipline in the armed forces.[14]

I. MILITARY DISCIPLINE AND READINESS DEMAND FAIR MILITARY JUSTICE.

The military's mission is "to fight or be ready to fight wars should the occasion arise." *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). Discipline and constant readiness are essential ingredients to the accomplishment of that mission. The Uniform Code of Military Justice, 10 U.S.C. §§ 801-940, was devised to maximize both of these essential ingredients.[15] Experts like Senator Sam Ervin have recognized, however, that military justice serves only two purposes – to maintain discipline and to rid the service of undesirable personnel.[16] Therefore, the possibility of a commander's unlawful influence of courts-martial in pursuit of these purposes is pervasive. *O'Callahan v. Parker*, 395 U.S. at 263-66.

The commander who ordered petitioners' trials sought to rid the Army of undesirable soldiers in a fundamentally

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[12] Patterson v. Lamb, 329 U.S. 539, 541 (1947) (First World War draftees).

[13] *See* Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955), *quoting* Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

[14] Middendorf v. Henry, 425 U.S. 25, 43 (1976); Burns v. Wilson, 346 U.S. 137, 140 (1953). *See also* Brown v. Glines, 444 U.S. 348, 360 (1980) (no legislative purpose found to allow unrestricted circulation of collective petitions).

[15] Hearings on H.R. 2498 before a Subcomm. of the Comm. on Armed Services, 81st Cong., 1st Sess., [hereinafter cited as Hearings], 597 (1949) (statement of Secretary of Defense James Forrestal).

[16] Hearings on S.Res. 260 before a Subcomm. of the Comm. on the Judiciary, [hereinafter cited as Senate Hearings, 1962], 87th Cong., 2d Sess., 141 (1962) (hearings conducted to ascertain how these purposes might be accomplished in accord with due process).

unfair and unlawful fashion. In the process, he adversely affected the interests of military discipline and readiness.

> What a few commanders fail to realize . . . is that the scales always become loaded against justice when [unlawful command influence is exerted] . . . . The result is drumhead justice – a situation which may as adversely affect discipline and morale as the offenses [committed].

United States v. Olson, 11 U.S.C.M.A. 286, 29 C.M.R. 102, 105 (1960). *See also United States v. Karlson*, 16 M.J. 469, 474 (1983) ("Congress has clearly recognized that unlawful command influence on the members of a court-martial has a pernicious effect not only on military justice but on discipline and morale as well").

Military leaders have long recognized that soldiers will sacrifice, even their lives, for a commander they view as fair and worthy of following – and that soldiers grudgingly follow a commander perceived as unfair and arbitrary. Major General John M. Schofield has reminded us that:

> The discipline which makes the soldiers of a free country reliable in battle is not to be gained by harsh or tyrannical treatment. On the contrary, such treatment is far more likely to destroy than to make an army.

Address to the Corps of Cadets, United States Military Academy, August 11, 1879. Similar sentiments were expressed in hearings before the Congress considering enactment of the UCMJ.

> Morale will never be so high as when the individual American soldier or sailor or airman is convinced that he is going to get a fully square deal if he is accused of a crime or offense and that he is going to be tried under a system of justice which is in accord with the traditional philosophy to which he has been accustomed. That is not going to interfere with his military efficiency. Far from doing that, it is going to increase his military efficiency.

Hearings, at 630 (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Association).

It is apparent, therefore, that the military best performs its mission when commanders fairly administer military justice.

II. CONGRESSIONAL INTENT TO ERADICATE COMMANDERS' UNLAWFUL INFLUENCE OF COURTS-MARTIAL IS BASED UPON PUBLIC PERCEPTION THAT MILITARY COMMANDERS UNFAIRLY INFLUENCE MILITARY JUSTICE AND IS DESIGNED TO PREVENT THE TYPE OF COMMAND ACTIONS WHICH TAINT PETITIONERS' CONVICTIONS.

The first Congressional prohibition of unlawful command influence over courts-martial was contained in an amendment to the Articles of War included within the Selective Service Act of 1948.[17] This statutory provision was a response to perceived and actual unfair command actions during both world wars. For instance, during the First World War, a commander could order the reconsideration of an acquittal. Hearings, at 608. Public outrage lead to elimination of that practice by statute.[18] Public reaction to unfair command actions during World War II was especially vociferous. Federal courts described instances of "military despotism,"[19] and characterized military courts as courts "saturated with tyranny."[20] In response, the Secretary of War appointed the War Department Advisory Committee on Military Justice, which held hearings around the country. The committee recommended measures to end commanders' control of courts-martial. It concluded:

> The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions . . . . The close association between the commanding general, the staff judge advocate, and the officers of

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[17] Pub. L. No. 759, 80th Cong., 2d Sess., ch. 625, 1948 U.S. CODE CONG. SERV. 619, 652 (Art. 88).

[18] Act of June 4, 1920, ch. 227, art. 40, 41 Stat. 787.

[19] Shapiro v. United States, 69 F. Supp. 205, 207 (Ct. Cl. 1947) (military defense lawyer summarily tried for overzealous actions while defending a soldier at trial).

[20] Beets v. Hunter, 75 F. Supp. 825, 826 (D.C. Kan. 1948), *rev'd on procedural grounds*, 180 F.2d 101 (10th Cir.), *cert. denied*, 339 U.S. 963 (1950).

> his division made it easy for the members of the court to acquaint themselves with the views of the commanding officer . . . . Not infrequently the members of the court were given to understand that in case of a conviction they should impose the maximum sentence provided in the statute so that the general, who had no power to increase a sentence, might fix it to suit his own ideas. Not infrequently the general reprimanded the members of a court for an acquittal or an insufficient sentence.[21]

Hearings before a House of Representatives subcommittee considering the proposed UCMJ further illustrate the type of conduct Congress intended to eradicate. The statement of then Representative Gerald R. Ford, Jr., is typical of those which the subcommittee considered:

> [My comments] are based upon my experience of some 46 months in the United States Navy during World War II . . . . It seems to me that a general statement can be made, with all honesty, that in the Navy, at least, justice is sometimes forgotten in order to impose on people in the service punishment of some kind or other. I am particularly concerned about the fact that in courts-martial too often a court-martial board does not determine the guilt or innocence of the accused; but rather, seeks to award punishment of one sort or another. I can recall hearing conversations between members of boards along this line; "What does the Old Man want us to do?" Now, that only illustrates the fact that these court-martial boards are not attempting to decide one way or another – is the man guilty or innocent. They are only trying to find out what the captain of a ship, or the commanding officer of a station, wants done with the man . . . I also participated in various courts martial; and the whole system is fundamentally wrong; and I am particularly pleased to see something being done about it. I

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[21] Report of War Department Advisory Committee on Military Justice 6-7 (1946).

> am not familiar with the exact legislation here, but I think that I reflect the attitude of many civilians who served in the armed forces during the last war.

Hearings, at 825-26.

The enactment of the UCMJ did little, however, to change the public perception of military justice.

> Many people have only the vaguest notion of military justice, and when they think about it at all they tend to perceive the Army as an establishment in which obedience is coerced and disobedience or misconduct ruthlessly, swiftly, and arbitrarily punished, with no hope of appeal or escape from the supposed brutalities of the system.

Senate Hearings, 1962, at 63 (statement of Hon. Alfred B. Fitt, Deputy Under Secretary of the Army). Ten years after the enactment of the UCMJ, those perceptions continued to be rooted in reality. A committee appointed by the Secretary of the Army in 1960 reported that in spite of the prohibitions of 10 U.S.C. § 837 and the sanctions of 10 U.S.C. § 898, commanders failed to understand "the dividing line between proper execution of command responsibilities and illegal command influence."[22] That conclusion has continuing viability even today – as MG Anderson's actions have made clear. Accordingly, Congress has recently expressed concern that military commanders' capricious exercise of their broad authority has the potential to adversely affect discipline in the armed forces and to dilute public support for the military.[23]

III. THE DECISION OF THE COURT OF MILITARY APPEALS NOT TO REVERSE PETITIONERS' CONVICTIONS FAILS TO GIVE MEANINGFUL EFFECT TO CONGRESSIONAL INTENT EXPRESSED IN 10 U.S.C. §§ 837 AND 898.

Senior military commanders who order courts-martial trials wield immense control over the members of their com-

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[22] Report to Hon. Wilber M. Brucker, Secretary of the Army, the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army 3 (1960).

[23] S. REP. No. 53, 98th Cong., 1st Sess. [hereinafter cited as Senate Report, 1983] 2 (1983).

mand. Such authority is necessary for the successful preparation for and fighting of wars. No one, including petitioners, contend that these commanders' authority should not include the authority to maintain discipline. Trials of servicemembers should nevertheless remain free from the arbitrary and capricious influence of commanders – and that is Congress' intent, expressed in 10 U.S.C. §§ 837[24] and 898.[25]

Even before the enactment of these statutes, however, interested citizens expressed a concern that unlawful command influence would be difficult to control.

> [N]o matter how many articles 37 you write forbidding coercion of the courts – so long as there are commanding generals who feel it is their duty to influence the courts because discipline requires it, they are going to find means to do so.

Hearings, at 652 (statement of Arthur E. Farmer, Chairman, Committee on Military Law of the War Veterans Bar Association). Military experience since enactment of 10 U.S.C. §§ 837 and 898 indicates that commanders have continued to attempt to eliminate servicemembers and otherwise impose unfair trial results in the name of discipline. *See, e.g., United States v. Littrice*, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953) (unlawful command action designed to eliminate thieves from the Army); *United States v. Fowle*, 7 U.S.C.M.A. 349, 22 C.M.R. 139 (1956) (Navy policy to

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[24] Congress amended 10 U.S.C. § 837 in 1968. Pub. L. No. 90-632, 82 Stat. 1335 (1968). Prior to that time, commanders gave pretrial orientations to court members and expressed views similar to those MG Anderson expressed to the members of his command. *See* West, A History of Command Influence on the Military Judicial System, 18 U.C.L.A. Rev. 1, 102-04 (1970). The 1968 amendment specifically limited pretrial orientations to information courses "in the substantive and procedural aspects of courts-martial."

[25] No commander has ever been convicted or tried for violating this statute. Some observers have been aware that military commanders are very reluctant to try by court-martial another commander for zealously enforcing discipline. Congress has refused, however, to adopt their suggestion that violations of this statute should be an indictable offense tried in United States District Court. *See* Hearings on S. 857 and H.R. 4080 before a Subcomm. of the Senate Comm. on Armed Services [hereinafter cited as Senate Hearings, 1949], 81st Cong., 1st Sess., 173 (1949) (statement of Brigadier General Franklin Riter).

separate with punitive discharges all sailors convicted of larcency or any other offense involving moral turpitude); *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) (attempt by commander to control trial results in 93 cases through an unauthorized means of appointing courts with appropriate command orientation)[26]; *United States v. Toon*, 48 C.M.R. 139 (1973) (*en banc*) (court members aware of command policy to confine and punitively discharge all drug dealers); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979) (commander indicated to court member and witnesses at courtroom door that things would be better if he could get particular soldiers properly taken care of); *United States v. Karlson*, 16 M.J. 469 (court members discussed concern of the commanding general that sentences were not severe enough and such results would be remedied by appointing more commanders as court members); *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985) (commanding general required court members in a prosecution for sale of drugs to hear during a recess a speech of the Marine Corps Commandant that drug trafficking was intolerable in the military and that drug traffickers should be out of the Marine Corps); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986) (commanding general excluded lower ranking enlisted soldiers as court members and replaced junior court members with more senior officers to obtain courts less disposed to lenient sentences). In all of these cases and in other cases, the military appellate courts have remedied both the perception of unfairness and the actual prejudice stemming from the commanders' unlawful actions by reversing the results of the trial courts. Yet in petitioners' cases, and in some 230 total cases MG Anderson convened, these same courts have refused to reverse. The Court of Military Appeals has explained its refusal:

> In all of [these cases ordered by Major General Anderson], we have upheld the decision of the Court of Military Review. Lest our action be construed as a tacit acceptance of illegal command influence in military justice, we emphasize that the decisions of the court below were preceded by extensive remedial action at that

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[26] *See* Finn, *Conscience and Command, Justice and Discipline in the Military* 122-35 (1971), for the egregious facts surrounding these cases.

level. Indeed, we commend that court for recognizing the inherent dangers caused by illegal command influence and for deciding each case in a manner consistent with legislative intent and prior case law.

This Court understands the desire of military commanders to assure that the members of their commands adhere to high standards of discipline. Certainly, we do not wish to inhibit lawful zeal in achieving this end. However, Congress, in its wisdom and pursuant to powers conferred upon it by the Constitution, has placed limits on the means that can be employed by commanders in seeking to maintain discipline. Moreover, we are convinced that most commanders understand full well the reasons why in our democratic society Congress considered these limitations to be appropriate.

One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command. In these cases, the commander, for whatever reason, failed to perform that duty adequately. Likewise, it is also apparent either that his legal advisor failed to perceive that a problem was developing for General Anderson's stated policies or that he was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice. The delay and expense occasioned by General Anderson's intemperate remarks and by his staff's implementation of their understanding of those remarks are incalculable. Several hundred soldiers have been affected directly or indirectly – if only because of the extra time required for completing appellate review of their cases. In addition, the military personnel resources – as well as those of this Court – required to identify and to surgically remove any possible impact of General Anderson's overreaching have been immense. Finally, and of vital importance, the adverse public perception of military justice which results from cases like these undercuts the continuing efforts of many – both in and out of

> the Armed Services -- to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterparts.
>
> A primary responsibility of this Court in its role as civilian overseer for the military justice system is to ensure that commanders perform their military-justice responsibilities properly and that they are provided adequate guidance by their legal advisors in performing those responsibilities. *Merely remedying the error in the cases before us is not enough.* Instead, we wish to make it clear that incidents of illegal command influence simply must not recur in other commands in the future.
>
> Recognizing that military commanders and judge advocates usually exert themselves in every way to comply with both the spirit and the letter of the law, we are confident that events like those involved here will not be repeated. *However, if we have erred in this expectation, this Court – and undoubtedly other tribunals – will find it necessary to consider much more drastic remedies.*

United States v. Thomas, 22 M.J. at 399-400 (emphasis added).

The court admits that the public perception continues to be that military justice is not as fair as civilian justice because of the influence of commanders – but fails to take effective action which will deter commanders' future actions. Rationale like this has lead commentators[27] to conclude that the Court of Military Appeals is ineffective in eliminating the unlawful command influence of courts-martial – in spite of the fact that Congress' primary motivation for the court's creation was the elimination of unlawful command influence.[28] Perhaps that is why Congress provided in 1983 for this Court's supervisory

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[27] *E.g.*, West, *supra*, note 22, at 120-37, 153.

[28] Hearings, at 608; Senate Hearings, 1949, at 37-38, 43-49 (statements of Mr. E.M. Morgan, Professor of Law, Harvard University, chairman of the committee which drafted the UCMJ); Schlesinger v. Councilman, 420 U.S. at 757-58; Noyd v. Bond, 395 U.S. at 694-95. *See also* Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962) (Court of Military Appeals created to insure that miltiary justice is administered in accord with due process).

authority over the Court of Military Appeals.[29] That court has ignored the lesson apparent from the cases it has decided for 35 years – that zealous commanders will ignore the controls Congress has placed on their military justice actions unless courts impose drastic remedies to enforce those Congressional controls. Therefore, this Court should enforce the provisions of 10 U.S.C. §§ 837 and 898 in the meaningful fashion Congress intended, but which the Court of Military Appeals has, in effect, chosen to ignore.

IV. REVERSAL OF PETITIONERS' CONVICTIONS WOULD GIVE MEANINGFUL EFFECT TO CONGRESSIONAL INTENT TO ERADICATE COMMANDERS' UNLAWFUL INFLUENCE OF COURTS-MARTIAL, INCREASE PUBLIC CONFIDENCE IN THE FAIRNESS OF MILITARY JUSTICE, AND ENHANCE THE DISCIPLINE AND READINESS OF OUR ARMED FORCES.

Although MG Anderson may have been motivated by a desire to enhance the discipline and readiness of his unit, he engaged in a bad faith attempt to influence the results of petitioners' trials. Judicial review of such bad faith action of a commanding general is proper. *Wade v. Hunter*, 336 U.S. 684, 692 (1949). Congress intends the Court to have direct review of decisions of the Court of Military Appeals so that Congressional intent and this Court's views on issues vital to military discipline may be given effect.[30] Questioning MG Anderson's decisions to order petitioners' trials and considering reversal as a remedy are appropriate in light of our

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[29] *See* H.R. REP. No. 549, 98th Cong., 1st Sess. (1983) (although issues of command control have previously been addressed, servicemembers are afforded a new, direct appeal to the Supreme Court to enhance their rights). *See also*, Senate Report 1983, at 8-9 ("The decisions of the Court [of Military Appeals] are of considerable importance to our Nation because they impact directly on the rights of servicemembers, the prerogatives of commanders, and the public perception of the fairness and effectiveness of the military justice system").

[30] Senate Report, 1983, at 9 (although Congress specifically intended to fashion a means whereby the President could seek review, the rationale applies to petitioners as well).

national policy since World War II of ensuring to service-members fair judicial treatment free from pernicious command control. *Cf. Vasquez v. Hillery*, 106 S.Ct. 617, 623 (1986) (the only remedy effective to deter racial discrimination in the selection of grand jurors is reversal, in light of the longstanding fundamental value involved); *United States v. Mechanik*, 106 S.Ct. 938, 942 n.1 (1986) (automatic reversal is a prophylactic means to deter pernicious action affecting fundamental policies).

Review is especially appropriate in petitioners' cases because the military justice system operates effectively only with public confidence. *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983), *quoting United States v. Stringer*, 5 U.S.C.M.A. 122, 17 C.M.R. 122 (1954). Major General Anderson's apparent exercise of unlawful command control mandates reversal, even if petitioners can demonstrate no particularized prejudice,[31] because "the general public . . . look with suspicion upon all things military and particularly on matters involving military justice."[32] The chairman of the committee which drafted the UCMJ has well explained the goal which, in light of public suspicion, the UCMJ was designed to achieved.

> We recognized that this is a combination of administration and justice and discipline. In our opinion there is just no question that you cannot ignore the disciplinary aspect of the thing but we feel that by the system we

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[31] *See* West, *supra*, note 22, at 95-6, regarding the difficulty of demonstrating prejudice. As to the lack of need to show prejudice, *see* Curry v. Secretary of Army, 595 F.2d at 876, and United States v. Johnson, 14 U.S.C.M.A. 548, 551, 34 C.M.R. 328, 331 (1964) ("The apparent exercise of command control . . . is as much to be condemned as its actual existence"). In any event, petitioners point to, as prejudice, the punitive discharges they will receive if this Court does not reverse their convictions in that a punitive discharge "so dishonors and disgraces an accused that he finds employment virtually impossible; is subjected to many legal deprivations, and is regarded with horror by his fellow citizens." United States v. Wheeler, 17 U.S.C.M.A. 274, 38 C.M.R. 72, 74 (1967).

[32] H.R. REP. NO. 491, 81st Cong., 2d Sess. 6 (1949). *See also* Sherrill, *Military Justice is to Justice As Military Music is to Music* (1970).

have set up, we have made a fair compromise of the thing and we are also insistent that when you have an Army that is composed of citizens, . . . you have got to have morale at home as well as morale in the Army; and that, unless our citizens believe that a man when he is charged before a court martial, is going to get the same kind of a square trial that he would get in the United States district court if he were charged there, then it seems to me you are going to have this constant dissatisfaction, this constant agitation against the Army and Navy and Air Force for the way they treat their men when they are charged with offenses.

Senate Hearings, 1949, at 49 (statement of Mr. Morgan).

Reversal of petitioners' convictions is the only proper remedy.[33] Reversal would lessen the public dissatisfaction with military justice which Congress intended to eliminate more than 35 years ago. Knowledge of the remedy of reversal would increase the support given military commanders by both civilians and servicemembers and hence bolster the ability of our armed forces "to fight or be ready to fight wars should the occasion arise."

Conclusion

Our military forces derive their strength from the support of the citizens of this nation. The depth of that support depends in good measure upon the perception that military commanders treat fairly the members of their commands.

Though uniquely qualified to effect the remedies necessary to inspire public confidence in the fairness of military justice, the Court of Military Appeals has abdicated its responsibility in petitioners' cases. Therefore, a writ of certiorari should issue to that court so that this Court may consider the remedy necessary to ensure that meaningful effect is given to Congressional intent to eliminate the unlawful command influence of courts-martial.

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[33] United States v. Wood, 13 U.S.C.M.A. 216, 32 C.M.R. 216, 231 (1962) (Ferguson, J., dissenting) ("only [reversal] will serve to require observance of the Congressional mandate contained in . . . Article 37, for we have yet to see a single person brought to trial for violation of an accused's right to an impartial hearing").

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

Nos. 48,011, 51,496, 52,896 and 53,423
CM 443527, CM 444195, SPCM 20588 and CM 444804

UNITED STATES, APPELLEE,

v.

ROGER E. THOMAS, SPECIALIST FOUR,
U.S. ARMY, APPELLANT.

UNITED STATES, APPELLEE,

v.

FRANKLIN K. COOK, JR., STAFF SERGEANT,
U.S. ARMY, APPELLANT.

UNITED STATES, APPELLEE,

v.

DONALD J. GIARRATANO, SPECIALIST FIVE,
U.S. ARMY, APPELLANT.

UNITED STATES, APPELLEE,

v.

KURT R. GONZALES, PRIVATE, U.S. ARMY, APPELLANT.

Sept. 22, 1986

For Appellant (Thomas): *Captain H. Alan Pell* (argued); *Colonel William G. Eckhardt, Lieutenant Colonel William P. Heaston, Lieutenant Colonel Paul J. Luedtke, Major Edwin D. Selby, Captain Craig E. Teller, Captain Audrey H. Liebross.*

For Appellee: *Captain Erik M. Stumpfel* (argued); *Colonel James Kucera, Lieutenant Colonal Gary F. Roberson, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Thomas M. Curtis, Captain Samuel J. Rob.*

For Appellant (Cook): *Lieutenant Colonel William P. Heaston* (argued); *Colonel William G. Eckhardt, Colonel Brooks B. La Grua, Major Edwin D. Selby, Captain Lorraine Lee.*

For Appellee: *Captain Samuel J. Rob* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Thomas M. Curtis, Lieutenant Colonel Gary F. Roberson.*

For Appellant (Giarratano): Captain Craig E. Telier (argued); *Colonel Brooks B. La Grua, Lieutenant Colonel William P. Heaston, Lieutenant Colonel Paul J. Luedtke, Major Eric T. Franzen, Captain Lorraine Lee.*

For Appellee: *Captain Samuel J. Rob* (argued); *Colonel James Kucera, Lieutenant Colonel Gary F. Roberson, Lieutenant Colonel Adrian J. Gravelle.*

For Appellant (Gonzales): *Captain Lorraine Lee* (argued); *Lieutenant Colonel Paul J. Luedtke* and *Major Eric. T. Franzen.*

For Appellee: *Captain Erik M. Stumpfel* (argued); *Colonel James Kucera, Lieutenant Colonel Gary F. Roberson, Lieutenant Colonel Adrian J. Gravelle.*

Opinion of the Court

EVERETT, Chief Judge:

These four cases, all argued on the same day, are among many received by this Court and by the United States Army Court of Military Review which question the fairness of the court-martial proceedings because of certain acts and comments of Major General Thurman E. Anderson, the Commanding General of Third Armored Division, and members of his staff.

During one or more briefings conducted among officers and noncommissioned officers within his command, General Anderson addressed the subject of testifying at an accused's court-martial. He stated that he found it paradoxical for a unit commander, who had recommended that an accused be tried by a court-martial authorized to adjudge a punitive discharge, to later appear as a defense character witness at the sentencing stage of the trial, testify as to the accused's good character, and recommend that the convicted soldier be retained in the service. Some of General Anderson's remarks were elaborated upon and possibly distorted by his subordinates. Be that as it may, his comments were later interpreted, or misinterpreted, to reflect an intent that a commander, first sergeant, or other person from an accused's unit, should not give favorable presentencing testimony on behalf of an accused. This interpretation may have also extended to findings.[1]

Based on the record of trial in appellant Giarratano's case and on the special findings by the military judge in that case[2], the Court of Military Review concluded that command influence was present at the Third Armored Division. *United States v. Treakle,* 18 M.J. 646 (A.C.M.R. 1984). Depending on the facts of each case, the Court of Military Review fashioned several different remedies. These included sentence rehear-

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[1] A detailed summary of the facts may be found in Part II of *United States v. Treakle,* 18 M.J. 646, 649-52 (through the first paragraph in the right column on page 652) (A.C.M.R. 1984).

[2] In *United States v. Giarratano,* the military judge found that the oral comments of General Anderson and the oral and written comments of his subordinates would logically cause members of the Third Armored Division to conclude that the commander who refers charges for trial to a general court-martial or special court-martial authorized to adjudge a bad-conduct discharge believes that the accused is guilty and should be punitively discharged and that any extenuation and mitigation testimony favorable to the accused should be ignored as meaningless or incredible. The military judge determined in *Giarratano* that the comments – taken together and in context – would reasonably cause an accused to be convicted more readily or subjected to a heavier sentence.

ings, if the record failed to show affirmatively that, in sentencing, the court members had not in fact been influenced by General Anderson's comments, *United States v. Treakle, supra* at 658-59; rehearings or reassessment of the sentence, if the record failed to show why the defense had not produced any character witnesses or if one or more witnesses who testified appeared to have been negatively influenced by General Anderson's remarks, *United States v. Schroeder,* 18 M.J. 792 (A.C.M.R.1984); *United States v. Hill,* 18 M.J. 757 (A.C.M.R.1984); and limited hearings to determine whether the accused had been deprived of character witnesses at the sentencing stage of the trial, *United States v. Abelon,* 19 M.J. 767 (A.C.M.R.1984); *United States v. Thompson,* 19 M.J. 690 (A.C.M.R.1984).

When additional information came to the attention of the Court of Military Review in the form of affidavits prepared by two officers from the Third Armored Division, that court first began to take remedial action at both the findings and post-trial review stages of the proceedings.[3] Thus, in *United States v. Mitchell,* 19 M.J. 905 (A.C.M.R.1985), the Court ordered a limited hearing on whether the court members had heard General Anderson's remarks and were influenced by them. If so, the findings and sentence were to be set aside and a rehearing ordered. In *United States v. Glidewell,* 19 M.J. 797 (A.C.M.R.1985), the Court of Military Review ordered a new review and action; and in *United States v. Scott,* 20 M.J. 1012 (A.C.M.R.1985); *United States v. Abelon* and *United States v. Thompson,* both *supra,* limited hearings were ordered to determine, among other issues, whether General Anderson was disqualified from reviewing and taking action on the case.

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[3] These officers were Lieutenant Colonel Mueller and Major Buchanan. Briefly summarized, Lieutenant Colonel Mueller's affidavit stated that he had been informed by Lieutenant Colonel Bozeman, the staff judge advocate of Third Armored Division, that General Anderson was displeased because Colonel Mueller had testified as a defense witness at the trials of two accused. Bozeman allegedly told Mueller that if a commander recommends trial by a court-martial authorized to adjudge a punitive discharge, he must believe that the accused is guilty and should be eliminated from the

With this background, we now turn to the central issue of these cases:

> Were the remedial actions taken by the Court of Military Review appropriate and adequate, under the circumstances of each case, to eliminate the prejudicial impact of unlawful command influence found to have been exercised within the Third Armored Division, or did General Anderson's comments have such a deleterious effect on the judicial process that even more drastic action, such as automatic reversal of the findings and sentence, is required?

In answering this question, we will begin by considering the general's actions at the referral stage of the trial, proceed through the findings and sentence, and end with the final review and action by the convening authority.

I

Preliminary Observations

Command influence is the mortal enemy of military justice. Therefore, in the Uniform Code of Military Justice, Congress specifically prohibited such activity. Art. 37, 10 U.S.C. § 837; *see also* Art. 98, UCMJ, 10 U.S.C. § 898. Subsequently, the Military Justice Act of 1968 expanded the command-influence prohibitions of Article 37. Pub.L.No. 90-632, § 2(13), 82 Stat. 1338. Indeed, a prime motivation for establishing a civilian Court of Military Appeals was to erect a futher bulwark against impermissible command influence. *See* Hearings on H.R. 2498 Before a Subcomm. of the House Committee on Armed Service, 81st Cong., 1st Sess. 608 (1949).

The exercise of command influence tends to deprive servicemembers of their constitutional rights. If directed against prospective defense witnesses, it transgresses the ac-

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service. Major Buchanan's affidavit corroborates Mueller's statement. He alleges that Bozeman stated that neither he nor the commander believed that it was proper for Mueller to testify as a defense witness.

cused's right to have access to favorable evidence. U.S. Const. amend. VI; *cf.* Art. 46, U.C.M.J., 10 U.S.C. § 846. If directed against defense counsel, it affects adversely an accused's right to effective assistance of counsel. *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); U.S. Const. amend. VI; *cf.* Art. 27, UCMJ, 10 U.S.C. § 827, and Art. 37. If the target is a court member or the military judge, then the tendency is to deprive the accused of his right to a forum where impartiality is not impaired because the court personnel have a personal interest in not incurring reprisals by the convening authority due to a failure to reach his intended result. *Cf. Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749 (1927); *United States v. Accordino,* 20 M.J. 102 (C.M.A.1985).

Under *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), a constitutional violation has been considered prejudicial unless the reviewing court concludes beyond a reasonable doubt that the trial result was not affected by the error. *Cf. United States v. Remai,* 19 M.J. 229 (C.M.A.1985). We observe that in some recent cases the Supreme Court seems to have retreated slightly from this standard. *Cf. United States v. Bagley,* ____ U.S. ____, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, in *Bagley,* the Supreme Court continued to apply the beyond-reasonable-doubt test where the prosecution knowingly used prejured testimony. The justification for employing this strict standard is "that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.' " 105 S.Ct. at 3382.

This rationale applies equally to command influence. A commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to "prosecutorial misconduct." Indeed, recognizing the realities of the structured military society, improper conduct by a commander may be even more injurious than such activity by a prosecutor. Likewise, as was perfectly clear to Congress when it enacted the Uniform Code of Military

Justice and the Military Justice Act of 1968 – and as the judges of this Court have always understood – command influence "involves 'a corruption of the truth-seeking function of the trial process.' "

Consequently, in cases where unlawful command influence has been exercised, no reviewing court may properly affirm findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence.

II

Referral for Trial

Articles 22-24, UCMJ, 10 U.S.C. §§ 822-824, respectively, prescribe who may convene various types of courts-martial. If a court-martial is convened by someone who is not in one of the categories set forth in those articles, then its action can be set aside for lack of jurisdiction. Articles 22(b) and 23(b) also direct that an officer shall not convene a general or special court-martial, if he "is an accuser." According to Article 1(9), UCMJ, 10 U.S.C. § 801(9), an "accuser" is "a person who signs and swears to charges . . . and any other person who has an interest other than an official interest in the prosecution of the accused."

Despite General Anderson's misguided zeal, his initial interest in the various prosecutions was official, rather than personal. Unlike the convening authority in *United States v. Gordon,* 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952), whose house had been broken into by the accused, General Anderson had not suffered an injury to his person or property. Unlike the convening authority in *United States v. Crossley,* 10 M.J. 376 (C.M.A.1981), and in *United States v. Shepherd,* 9 U.S.C.M.A. 90, 95 – 100, 25 C.M.R. 352, 357 – 62 (1958), his ego was not directly assailed by the accused's actions. Unlike the convening authority in *United States v. Corcoran,* 17 M.J. 137 (C.M.A.1984), and in *United States v. Marsh,* 3

U.S.C.M.A. 48, 11 C.M.R. 48 (1953),[4] his authority was not willfully flouted.

At a later time, after the wholesale exercise of command influence had come to light, the situation changed somewhat. At that point, General Anderson and his staff judge advocate, Lieutenant Colonel John R. Bozeman, were being attacked repeatedly, and the general probably had become quite defensive about his prior remarks. Perhaps, he then possessed a disqualifying personal interest in the outcome of cases to be referred. However, even then any defect in referral would not have been jurisdictional. *Cf. United States v. Ridley*, 22 M.J. 43 (C.M.A.1986); *United States v. Blaylock*, 15 M.J. 190 (C.M.A.1983). Thus, the findings and sentence would not be void but would only be subject to being set aside upon appellate review.

Another claim that has been presented with respect to referrals is that General Anderson's remarks may have led unit commanders to recommend a higher echelon of court-martial than otherwise might have been utilized. However, as we understand the tenor of his comments, they were directed chiefly towards conduct of prospective witnesses after charges had been preferred, and they tended to cut off testimony in an accused's behalf only after a recommendation for his court-martial had been made. Thus, during processing of charges before referral, General Anderson's comments would not have adversely affected an accused. Conceivably, those remarks might even have benefited an accused because if his unit commander entertained a favorable opinion of him, that commander might have utilized nonjudicial punishment or administrative action, instead of seeking trial by court-martial where the results might prove to be too harsh.

III

Findings Based on Pleas of Guilty

In many of the cases referred by General Anderson, guilty pleas were entered – usually pursuant to pretrial agree-

[4] *Marsh* was itself an extreme case and has been greatly restricted by *United States v. Teal*, 4 U.S.C.M.A. 39, 15 C.M.R. 39 (1954); and *United States v. Keith*, 3 U.S.C.M.A. 579, 13 C.M.R. 135 (1953).

ments. Now it is contended that these accused should be allowed to withdraw these pleas and that the findings based thereon should be vacated. One rationale for this argument is that the pleas were involuntary because evidence available to such an accused was curtailed by General Anderson's actions, so guilty pleas were entered merely by reason of the hopeless predicament in which the accused had been placed. Another argument is that the actions of General Anderson were so pernicious that, *per se,* they tainted every proceeding with which he had any contact. *Cf. United States v. Treakle, supra* at 663 (Yawn, J., concurring in part and dissenting in part).

We are not persuaded by these arguments. In the first place, we are unable to find in the records before us any accused who entered a guilty plea because of the unavailability of witnesses who, in the absence of General Anderson's interference, might have testified at trial. Certainly, no such claim has been brought to our attention. *Cf. Hill v. Lockhart,* ___ U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

In this connection, we note that in trials by court-martial there is special concern that an accused's pleas of guilty be provident and that a plea of guilty not be accepted unless an accused truly believes that he is guilty. Article 45 of the Uniform Code of Military Justice, 10 U.S.C. § 845, requires that a guilty plea be vacated if the accused offers evidence inconsistent therewith. Moreover, the providence inquiry prescribed by this Court requires that an accused who pleads guilty be questioned by the judge about the relevant facts in order to establish a factual basis for the plea. *See United States v. King,* 3 M.J. 458 (C.M.A.1977); *United States v. Green,* 1 M.J. 453 (C.M.A.1976). From his own lips, such an accused must affirm that he knows he is guilty of the elements of the offense or that – if he lacks such knowledge for some reason, such as amnesia – he is satisfied as to the existence of the facts establishing his guilt. *See United States v. Butler,* 20 U.S.M.A. 247, 43 C.M.R. 87 (1971). Moreover, as an added guarantee of the accuracy of the guilty plea, the President has prescribed in the Manual for Courts-Martial

(1984) that an accused shall be under oath when he testifies at a providence hearing. R.C.M. 910(e), Manual for Courts-Martial, United States, 1984.

Thus, the situation in courts-martial is unlike that which prevails in many civilian courts, where a plea of guilty may be accepted even though a defendant maintains his innocence. *Cf. North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Because of these limitations, military justice usually is not characterized by the extensive prosecutorial arm-twisting to obtain guilty pleas that exists in some civilian courts. *Cf. Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

In view of the safeguards surrounding the entry of guilty pleas by accused servicemembers, we perceive no unfairness in letting stand the guilty pleas entered in cases from the Third Armored Division. The possibility that, if General Anderson had not interfered, an accused who entered pleas of guilty might have pleaded not-guilty, introduced evidence, and obtained an acquittal is so remote that it does not disturb us – especially where no specific claim to this effect has been made. In these cases, we are persuaded beyond a reasonable doubt that the findings based on these provident guitly pleas were not affected by command influence.

Admittedly, we must be concerned not only with factual accuracy of a trial result but also with the procedures employed in obtaining it. *Cf. Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). For instance, a coerced waiver of the privilege against self-incrimination may require relief, even though the incriminating evidence which is obtained thereby leads to an accurate finding of guilt. However, any indirect pressure to plead guilty generated by General Anderson was of far less magnitude than that which has been regularly tolerated by the Supreme Court. *Cf. Bordenkircher v. Hayes, supra.* Moreover, there is no indication that any of General Anderson's command-influence activities were intended to induce guilty pleas. Accordingly, we conclude that any guilty pleas entered pursuant to the providence-inquiry procedures previously prescribed by this Court should not be withdrawn, and the findings of guilty entered pursuant to such pleas can be upheld.

IV

Findings Based on Pleas of Not Guilty

In determining whether an accused's trial in a contested case before court members was adversely affected by command influence, we first consider the impact that such activities and communications may have had on the court members. In this regard, we place the burden upon both defense and trial counsel, as well as the military judge, to fully question the court members during voir dire and to determine thereby whether any of the members had knowledge of the commander's comments and, if so, whether the comments had an adverse impact on the member's ability to render an impartial judgment. When required, witnesses may be called to testify on this issue. *United States v. Karlson,* 16 M.J. 469 (C.M.A.1983). However, we are not prepared to disqualify members of a court-martial panel simply because they were assigned or were in close proximity to the command where the comments were made. To do so would ignore the members' oath to adhere to the military judge's instructions and to determine the facts in accordance therewith. *Cf. United States v. Garwood,* 20 M.J. 148 (C.M.A.1985).

In cases tried by military judge alone, we have no reason to believe that the command influence would have had any impact on the judges, who were completely independent of General Anderson and of other commanders in the field. Moreover, absent some specific claim to the contrary, we shall not assume that an accused chose trial by judge alone because of concerns about the impartiality of the court members.

In contested cases tried by members or by judge alone, a second question is whether the commander's comments so impeded the accused's access to defense witnesses that he was deprived of his sixth-amendment right to have witnesses called on his behalf. As already noted, the standard we shall use in testing for prejudice in this regard is that of *Chapman v. California, supra. Cf. United States v. Remai, supra.*

In view of this high standard, if an accused properly raises the issue that his ability to secure favorable evidence has been impaired, the Government obviously bears a heavy burden in establishing that defense access to witnesses (character or otherwise) was not impeded by command influence to the extent that it affected the results of trial. Indeed, appellate defense counsel might well argue that the Government can never overcome this heavy burden because there will always be a possibility that a witness might have been available who could have tipped the scales in the defense's behalf.

In this connection, we draw a distinction between two classes of witnesses: (a) character witnesses, and (b) witnesses who will testify on matters other than an accused's character. As to the former, there was the greater likelihood that testimony would be inhibited by General Anderson's remarks. It is questionable whether his remarks could have been construed to apply to the latter class of witnesses.

To satisfy its burden of demonstrating that an accused was not deprived of favorable character witnesses, the Government might elect to proceed in one of several ways. The first would be to show that appellant had offered extensive favorable character evidence at trial, so that it could be inferred that General Anderson's remarks had not inhibited the availability of character witnesses. A second way would be to demonstrate from the accused's military records and otherwise that there simply was no evidence of good character available or that readily available rebuttal evidence of bad character would have been so devastating that, as a tactical matter, the accused could not have afforded the risk of putting his character in evidence. A third way for the Government to meet its burden might be to demonstrate that the prosecution evidence at trial was so overwhelming that there was no way in which the character evidence could have had an effect. This latter alternative should be used very sparingly, however: First, we recognize that character evidence can be very effective in creating reasonable doubt at trial; and, second, we do not wish to create even an appearance of condoning command influence on findings.

For witnesses other than character witnesses, the prosecution can satisfy its burden by demonstrating that everyone who had relevant information testified at trial and that none of these witnesses felt under any pressure to testify in a certain way. Another way would be to show that, although some persons with relevant information did not testify, their testimony would have been unfavorable to the accused.

V

Sentencing

In gauging the effect of command influence on an accused's sentence, the same approach should be used as for findings in contested cases. If the issue is properly raised, the burden is on the Government to establish beyond a reasonable doubt that favorable evidence in extenuation and mitigation was not curtailed by General Anderson's command activities. To satisfy this burden, the Government may demonstrate by an accused's military records or otherwise that no favorable evidence relevant to an accused's service in the Third Armored Division was available, as evidenced by his military records and otherwise, or that the defense made an informed decision not to present such evidence because it would have opened the door to damaging rebuttal evidence readily available to the prosecutor. If the record fails to show that the Government has met its burden, a rehearing on sentence or meaningful reassessment of the sentence, if possible, would be the appropriate remedy.

We note that there is no indication that, in appointing court members, General Anderson sought to name persons who were predisposed to adjudge heavy sentences. *Cf. United States v. McClain*, 22 M.J. 124 (C.M.A.1986). Of course, if he had followed this policy, resentencing would be in order because of the violation of Article 37.

VI

Review and Action

The Court of Military Review has directed new post-trial reviews in cases where the initial review was performed

by General Anderson. Avoidance of any appearance of evil provides ample justification for requiring this procedure. Moreover, in many of the cases he reviewed, General Anderson was confronted with claims that his command influence had prejudiced the accused at trial and necessitated major remedial action. He could hardly be expected to review impartially contentions that his own acts had transgressed Article 37 and had violated the rights of the accused.

VII

We shall now apply these principles to the four cases presently under consideration.

United States v. Thomas (Docket No. 48011/AR):

Specialist Four Thomas was originally tried by a military judge sitting alone as a general court-martial on October 25, 1982. Pursuant to his negotiated pleas, he was found guilty of aggravated assault, violation of a lawful general regulation by possessing a switchblade knife, and committing an assault and battery with his fists, in violation of Articles 128 and 92, UCMJ, 10 U.S.C. §§ 928 and 892, respectively. His sentence to a dishonorable discharge, confinement for 12 months, total forfeitures, and reduction to the grade of E-1 was approved by General Anderson on December 14, 1982.

As the issue of command influence in this case had first been raised in this Court, the record was remanded to the Court of Military Review in January 1984. That Court ordered a rehearing on sentence because of the few witnesses who had testified on behalf of the appellant during the sentence proceedings. At the sentence rehearing conducted by direction of the Commander, 1st Infantry Division (Mech), the defense introduced stipulations of expected testimony from Thomas' platoon leader and squad leader and favorable evidence regarding his performance while he was confined and while he was employed when on excess leave. He was sentenced to a bad-conduct discharge, confinement for 10 months, total forfeitures, and reduction to the lowest enlisted grade. The new general court-martial convening authority reduced the period of confinement to 8 months but otherwise

approved the sentence as adjudged. On August 2, 1985, the Court of Military Review affirmed the sentence adjudged at the rehearing.

The remedy adopted by the Court of Military Review eliminated any possibility of prejudice. Our examination of the providence inquiry convinces us that Thomas' pleas of guilty were not affected by the command-influence problem and were based upon his belief in his own guilt. The rehearing on sentence and the action by a new reviewing authority remedied any problems which may have existed at these stages of the proceedings. Accordingly, we conclude that the decision of the Court of Military Review is correct.

United States v. Cook (Docket No. 51496/AR):

Sergeant Cook was tried before a military judge alone on February 10, 1983. Pursuant to his negotiated pleas, he was found guilty of unauthorized absence, resisting apprehension, escape from custody, possession of hashish, and two bad-check offenses, in violation of Articles 86, 95, 134, and 123a, UCMJ, 10 U.S.C. §§ 886, 895, 934, and 923a, respectively. He was sentenced to a bad-conduct discharge and reduction to the grade of E-1. The findings and sentence were approved by General Anderson on April 23, 1984. On October 31, 1984, the Court of Military Review set aside the bad-conduct discharge because "no one from appellant's . . . command testified during sentencing" and "[t]he record provide[d] no explanation" as to why such witnesses did not appear. Unpublished opinion at 3.

The substantial reduction of the sentence by the Court of Military Review eliminated any possibility that Sergeant Cook was prejudiced by the absence of character witnesses during the sentencing stage of his trial. Likewise, appellant could not have been prejudiced by the failure of the Court of Military Review to order a new review and action by another convening authority. It is highly unlikely that any new convening authority would equal the sentence relief given by the Court of Military Review. Accordingly, we conclude that the decision of the Court of Military Review is correct.

United States v. Giarratano (Docket No. 52896/AR):

After hearing the voluminous evidence presented on the command-influence issue, the military judge found that no person in Giarratano's chain of command had attended any of General Anderson's meetings and none had discussed the charges against Giarratano with General Anderson. He nevertheless found that the following remedial actions were required:

> (1) If the accused elected trial by members, he would "sustain any [defense] challenge for cause against a panel member who was a member of a Third Armored Division unit prior to 4 March 1983" (date General Anderson first attempted to clarify or retract some of his earlier statements).
>
> (2) Although "no member of" Giarrantano's "chain of command testified that they were unlawfully directed or influenced not to testify" on his behalf and none expressed "any fear of" reprisal if they did so, the military judge ruled, as a matter of caution, that no character evidence would be received which was "unfavorable to the accused."
>
> (3) As General Anderson's "credibility [was] called into question," the military judge found that the general was disqualified from taking action on the case.

Thereafter, Giarratano elected to be tried by judge alone. He made no claim that his choice was based on any fear that a court-martial composed of members would be unable to render a fair verdict. Contrary to his pleas, he was found guilty of distributing hashish, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The evidence to prove his guilt was overwhelming. The Government showed that Giarratano sold three pieces of hashish to two undercover agents. The defense presented no evidence on the merits. Except for Giarratano's own sworn statement during the presentencing stage of the trial, no other witnesses were called by the defense. Trial defense counsel had informed the military judge at an earlier stage of the trial, however, that he was "not aware of any chilling effect upon potential witnesses in the case." Giarratano's sentence to a bad-conduct discharge, confinement for 3 months, forfeiture of $100.00 pay per

month for 3 months, and reduction to the grade of E-1 was approved by the Commander, 21st Support Command, on April 12, 1984. The Court of Military Review affirmed. 20 M.J. 553 (A.C.M.R.1985).

We perceive no basis for concluding that the convening authority was disqualified to refer the case for trial. The extensive findings of fact in *Giarratano* and the remedial actions taken by the military judge eliminated any possibility of prejudice at either the findings, sentencing, or review stages of the proceedings. Accordingly, we conclude that the decision of the Court of Military Review is correct.

United States v. Gonzales (Docket No. 53423/AR):

The remedy employed by the Court of Military Review in this case was the same as that in *United States v. Thomas*. Gonzales was tried on July 21, 1983, by a military judge sitting alone as a general court-martial. Pursuant to his pleas, he was convicted of two specifications of distribution of marijuana; using a false pass; as well as possession of hashish and marijuana with intent to distribute, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was sentenced to a dishonorable discharge, confinement for 16 months, total forfeitures, and reduction to the grade of E-1. Adhering to the terms of a pretrial agreement, General Anderson approved the sentence but suspended confinement in excess of 14 months for a period of 6 months.

On November 5, 1984, the Court of Military Review permitted a rehearing on sentence if ordered by a different convening authority because no witnesses had testified for appellant and the record was silent as to why such witnesses were absent. At the sentence rehearing conducted in January 1985, the defense presented, by way of stipulation, favorable testimony from Gonzales' former platoon sergeant. The defense also assured the military judge that other potential witnesses had been contacted but that the defense had elected not to produce them. Gonzales' sentence at the rehearing to a dishonorable discharge, confinement for 10 months, total forfeitures, and reduction to the lowest enlisted grade was approved by the Commander, Fort Leavenworth, on February 11, 1985. This sentence was affirmed by the Court of Military Review on June 25, 1985.

At the time of referral, General Anderson was not disqualified to act as a convening authority. The sentence rehearing and action by a different convening authority cured any prejudicial error that may have been caused by General Anderson's remarks. Accordingly, we conclude that the decision of the Court of Military Review is correct.

VIII

Epilogue

In all four of these cases, we have upheld the decision of the Court of Military Review. Lest our action be construed as a tacit acceptance of illegal command influence in military justice, we emphasize that the decisions of the court below were preceded by extensive remedial action at that level. Indeed, we commend that court for recognizing the inherent dangers caused by illegal command influence and for deciding each case in a manner consistent with legislative intent and prior case law.

This Court understands the desire of military commanders to assure that the members of their commands adhere to high standards of discipline. Certainly, we do not wish to inhibit lawful zeal in achieving this end. However, Congress, in its wisdom and pursuant to powers conferred upon it by the Constitution, has placed limits on the means that can be employed by commanders in seeking to maintain discipline. Moreover, we are convinced that most commanders understand full well the reasons why in our democratic society Congress considered these limitations to be appropriate.

One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command. In these cases, the commander, for whatever reason, failed to perform that duty adequately. Likewise, it is also apparent either that his legal advisor failed to perceive that a problem was developing from General Anderson's stated policies or that he was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice. The delay and expense occasioned by General Anderson's intemperate remarks and

by his staff's implementation of their understanding of those remarks are incalculable. Several hundred soldiers have been affected directly or indirectly – if only because of the extra time required for completing appellate review of their cases. In addition, the military personnel resources – as well as those of this Court – required to identify and to surgically remove any possible impact of General Anderson's overreaching have been immense. Finally, and of vital importance, the adverse public perception of military justice which results from cases like these undercuts the continuing efforts of many – both in and out of the Armed Services – to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterparts.

A primary responsbility of this Court in its role as civilian overseer for the military justice system is to ensure that commanders perform their military-justice responsibilities properly and that they are provided adequate guidance by their legal advisors in performing those responsibilities. Merely remedying the error in the case before us is not enough. Instead, we wish to make it clear that incidents of illegal command influence simply must not recur in other commands in the future.

Recognizing that military commanders and judge advocates usually exert themselves in every way to comply with both the spirit and the letter of the law, we are confident that events like those involved here will not be repeated. However, if we have erred in this expectation, this Court – and undoubtedly other tribunals – will find it necessary to consider much more drastic remedies.

The decisions of the United States Army Court of Military Review in Number 48,011 (Thomas); 51,496 (Cook); 52,896 (Giarratano); and 53,423 (Gonzales) are affirmed.

Judge SULLIVAN did not participate.[5]

COX, Judge (concurring):

I concur with Chief Judge EVERETT and join him in recognizing the hard work put into these cases by the Court of Military Review and appellate counsel, both for the Gov-

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[5] Judge Sullivan did not participate in the decision of any other case involving the issues decided herein.

ernment and the defense. I am satisfied that as a result of the careful scrutiny given each record of trial, any possible prejudice that a soldier may have suffered has been ferreted out and corrected. If not, the doors of this Court remain open to hear particularized claims of prejudice.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54148/AR
CMR Dkt. No. 445367

UNITED STATES, APPELLEE

v.

GREGORY JONES (077-52-8757), APPELLANT

ORDER

On further consideration of the granted issue (22 M.J. 355) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty and the sentence rehearing conducted pursuant to the order of the Court of Military Review. Accordingly, it is by the Court this 24th day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (ANDERSON)
Appellate Government Counsel (ROB)

APPENDIX C

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54181/AR
CMR Dkt. No. 19606

UNITED STATES, APPELLEE

v.

BYRON K. WARE (456-29-5598), APPELLANT

ORDER

On further consideration of the granted issue (22 M.J. 355) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that unlawful command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty and trial before a military judge alone; the fact that character witnesses testified in his behalf at the sentencing stage of the trial; and that a new review and action were ordered by the Court of Military Review. Accordingly, it is by the Court this 24th day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For the Court:

/s/ JOHN A. CUTTS, III
John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (INGOLD)
Appellate Government Counsel

APPENDIX D

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445367

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR GREGORY JONES, 077-52-8757,
UNITED STATES ARMY, APPELLANT

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8 JAN 1985

Major Robert M. Ott, JAGC, Captain L. Sue Hayn, JAGC, and Captain Barry Rothman, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Captain Samuel J. Rob, JAGC, and Captain Mark D. McLane, JAGC, were on the pleadings for appellee.

Before SUTER, RABY, and COHEN, Appellate Military Judges

MEMORANDUM OPINION

Per Curiam:

In accordance with his pleas, the appellant was convicted by a military judge sitting as a general court-martial of wrongful possession and distribution of hashish, aggravated assault, communication of a threat, and willful disobedience of a superior noncommissioned officer. He was sentenced to a dishonorable discharge, confinement at hard labor for ten years, total forfeitures, and reduction to the lowest enlisted grade. Pursuant to a pretrial agreement, the convening authority approved the sentence but suspended for one year

that portion of the sentence adjudging confinement in excess of four years. The appellant now contends that the convening authority, Major General Anderson, engaged in unlawful command influence which tainted the proceedings against him.

This Court recently considered *en banc* the issue of unlawful command influence in the 3d Armored Division. *United States v. Treakle*, 18 M.J. 646 (ACMR 1984) (en banc); *United States v. Yslava*, 18 M.J. 670 (ACMR 1984) (en banc). For the reasons stated in *Treakle*, we hold that the findings in this case were unaffected by the presence of unlawful command influence in the 3d Armored Division. The record in this case establishes that the appellant sold hashish to Specialist Four Scott, a confidential informant for the Giessen drug suppression team. The appellant was apprehended soon thereafter. Approximately two months later, Specialist Scott's roommate allowed the appellant to enter his billets room with an aluminum baseball bat and hide while awaiting Specialist Scott's return. When Specialist Scott entered the room, the appellant attacked Scott with the baseball bat. Knowing the strength of the government's case, the appellant negotiated a pretrial agreement to plead guilty. Considering these facts, we find no reasonable possibility that the appellant's pleas of guilty were affected by unlawful command influence. *See United States v. Yslava*, 18 M.J. at 672.

We do, however, find error in the sentencing phase of appellant's trial. The only evidence presented in mitigation was the appellant's unsworn statement. The record provides no explanation for the absence of testimony on the appellant's behalf. Absent such an explanation, we presume prejudice for the reasons stated in *United States v. Schroeder*, 18 M.J. 792 (ACMR 1984). The government has failed to rebut this presumption of prejudice.

The remaining assigned errors are without merit. The findings of guilty are affirmed. The sentence is set aside. A rehearing on the sentence may be ordered by a different convening authority.

Senior Judge RABY did not participate in this decision.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX E

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445367

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR GREGORY JONES, 077-52-8757,
UNITED STATES ARMY, APPELLANT

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12 NOVEMBER 1985

For Appellant: Lieutenant Colonel Paul J. Luedtke, JAGC, Captain Richard J. Anderson, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Samuel J. Rob, JAGC (on brief).

Before RABY, CARMICHAEL and ROBBLEE, Appellate Military Judges

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DECISION ON FURTHER REVIEW

Per Curiam:

This case is before us following a sentence rehearing ordered by the court in its decision of 8 January 1985. Upon consideration of the entire record, the sentence is affirmed.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX F

UNITED STATES ARMY COURT OF
MILITARY REVIEW

SPCM 19606

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR BYRON K. WARE, 456-29-5598,
UNITED STATES ARMY, APPELLANT

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8 FEB 1985

Lieutenant Colonel William P. Heaston, JAGC, Major Lawrence F. Klar, JAGC, and Captain Melvin F. Fortes, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, Captain Samuel J. Rob, JAGC, and Captain Paul E. Jordan, JAGC, were on the pleadings for appellee.

Before MARDEN, PAULEY, and WERNER, Appellate Military Judges

MEMORANDUM OPINION

Per Curiam:

In accordance with his pleas, appellant was convicted by a military judge sitting alone, or purchasing and selling cigarettes in violation of a United States Army, Europe, general regulation, and of wrongfully soliciting other service personnel to violate the same regulation. The adjudged sentence of a bad-conduct discharge, confinement at hard labor for two months, reduction to Private E-1, forfeiture of $382.00 pay per month for two months and a fine of $600.00

did not exceed the terms of a pretrial agreement. However, the convening authority did not approve the fine but did approve the remainder of the sentence.

Appellant contends that the convening authority, Major General Thurman E. Anderson, was disqualified from participating in any phase of his case and unlawfully influenced the court-martial with respect to findings and sentence. We disagree that the convening authority was disqualified from referring the case to trial or that appellant's pleas were improvident. *United States v. Bakken*, SPCM 20175 (ACMR 13 Dec. 1984). We also believe that the adjudged sentence was untainted by unlawful command influence.

Appellant's first sergeant was the only witness to testify on his behalf during presentencing. Based upon his observation of appellant's duty performance, he testified that appellant was "knowledgeable" in his job" and "he never experienced any problems in being able to get him to do that job." We hold that this testimony adequately rebuts the presumption emanating from General Anderson's message to his subordinates. In *United States v. Treakle*, 18 M.J. 646 (ACMR 1984) (en banc), we presumed that the General's influence discouraged commanding officers and senior noncommissioned officers from giving character testimony on behalf of accused persons. To overcome the presumption, the Government must show that subordinates to whom the comments were directed were unaffected by the General's comments. *United States v. Schroeder*, 18 M.J. 792 (ACMR 1984). We hold that this was accomplished here by virtue of the first sergeant's testimony.

However, in view of the conflicting affidavits from Lieutenant Colonel Mueller and Colonel Bozeman, the review and action by the convening authority will be set aside. *See United States v. Thompson*, 19 M.J. 690 (ACMR 1984).

The action of the convening authority, dated 17 June 1983, is set aside. The record of trial is returned to The Judge Advocate General for a new review and action by a different convening authority.

Senior Judge MARDEN did not participate in the direction of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX G

UNITED STATES ARMY COURT OF MILITARY REVIEW

SPCM 19606

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR BYRON K. WARE, 456-29-5598, UNITED STATES ARMY, APPELLANT

---

16 December 1985

For Appellant: Lieutenant Colonel William P. Heaston, JAGC, Major Lawrence F. Klar, JAGC, Major John E. King, JAGC, Captain Melvin F. Fortes, JAGC, Captain James E. Girvin, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Larry D. Williams, JAGC, Captain Kathy J. M. Peluso, JAGC (on brief).

Before MARDEN, PAULEY, and De GIULIO, Appellate Military Judges

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DECISION ON FURTHER REVIEW

Per Curiam:

This case is before the Court for further review pursuant to Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (Supp. I 1983) following completion of a new review and action as previously ordered by the Court. *United States v. Ware*, SPCM 19606 (ACMR 8 Feb. 1985) (unpub.).

On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

Senior Judge MARDEN did not participate in the decision of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

U.S. GOVERNMENT PRINTING OFFICE: 1986—168-266/42006

Nos. 86-825 and 86-826

In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY JONES AND BYRON K. WARE, PETITIONERS

v.

UNITED STATES OF AMERICA

ROGER E. THOMAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, on the facts of this case, the court-martial convening authority was disqualified as an "accuser" within the meaning of Article 1(9) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801(9).

2. Whether the courts below erred in applying the constitutional harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), to instances of unlawful command influence, in violation of Article 37, UCMJ, 10 U.S.C. 837, rather than in applying a rule of per se reversal.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-19a)[1] in *United States* v. *Thomas*, *United States* v. *Cook*, and *United States* v. *Giarratano* is reported at 22 M.J. 388. The opinions of the Court of Military Appeals in the remaining cases (Pet. App. 47a, 52a, 59a, 68a-69a, 76a, 83a, 92a, 104a) are unreported.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 86-826.

JURISDICTION

The judgment of the Court of Military Appeals in No. 86-826 in the cases of petitioners Thomas, Cook, and Giarratano was entered on September 22, 1986 (86-826 Pet. App. 1a). The judgments in No. 86-825 and in the remaining cases in No. 86-826 were entered between September 23, 1986, and October 10, 1986 (86-825 Pet. App. 21a, 22a; 86-826 Pet. App. 47a, 52a, 59a, 68a, 76a, 83a, 92a, 104a). The petitions for writs of certiorari in No. 86-825 and No. 86-826 were filed on November 21, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

1. The 13 petitioners are soldiers under the control of the Third Armored Division of the United States Army stationed in Germany. They were convicted in separate courts-martial of various crimes under the Uniform Code of Military Justice (UCMJ).[2] Petitioners' claims stem from the comments and activities of the court-martial convening authority, Major General Thurman E. Anderson, and his subordinates prior to petitioners' separate trials.[3]

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[2] Eleven of the 13 petitioners pleaded guilty to the charges against them. Petitioners Giarratano and McCallum pleaded not guilty. Giarrantano was tried before a military judge sitting as a special court-martial, and McCallum was tried before a general court-martial composed of officer members. Pet. App. 33a, 71a-72a.

[3] In conjunction with his assumption of command, General Anderson became the general court-martial convening authority. The convening authority is the officer who has authority to convene a court-martial. This position in the military justice system has no civilian counterpart. The duties of the convening authority have been characterized as both judicial

a. Major General Anderson assumed command of the Third Armored Division, headquartered in Frankfurt, Germany, on February 19, 1982. During the period from April to December 1982, General Anderson spoke at approximately ten different meetings, held at different locations throughout his command, at which the topic of testifying on behalf of accused soldiers at courts-martial was raised. General Anderson's extemporaneous remarks were typically made in the course of lectures and discussions on a variety of topics. As the Court of Military Appeals summarized (Pet. App. 2a-3a), General Anderson "found it paradoxical for a unit commander, who had recommended that an accused be tried by a court-martial authorized to adjudge a punitive discharge, to later appear as a defense character witness at the sentencing stage of the trial, testify as to the accused's good character, and recommend that the convicted soldier

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and quasi-prosecutorial. See *United States* v. *Yslava*, 18 M.J. 670, 674 (A.C.M.R. 1984) (en banc), remanded, No. 50410 (C.M.A. Sept. 25, 1986), new review and action ordered, No. 44515 (A.C.M.R. Oct. 15, 1986); *United States* v. *Ellsey*, 16 C.M.A. 455, 37 C.M.R. 75 (1966). The convening authority receives criminal charges from an "accuser," usually an accused's immediate commander, along with recommendations from the defendant's chain of command as to an appropriate disposition. The convening authority ultimately decides whether there is sufficient evidence to justify a court-martial and, if so, what level of court-martial is appropriate. This process is known as "referral." See Arts. 1(9), 32, 33, 34, UCMJ, 10 U.S.C. (& Supp. III) 801(9), 832, 833, 834. The convening authority has a variety of other duties affecting the court-martial proceeding, which include selecting the court-martial members (if the accused requests a panel), approving pretrial agreements, and granting immunity. See Rule 503(a)(1), 705(a), 704(c), *Manual for Courts-Martial, United States—1984*.

be retained in the service." The court noted that "[s]ome of General Anderson's remarks were elaborated upon and possibly distorted by his subordinates. Be that as it may, his comments were later interpreted, or misinterpreted, to reflect an intent that a commander, first sergeant, or other person from an accused's unit, should not give favorable presentencing testimony on behalf of an accused. This interpretation may have also extended to findings" at the guilt stage of courts-martial (*id.* at 3a).[4]

b. In late January or early February 1983, a military defense attorney in the course of a pretrial interview discovered that a noncommissioned officer believed that a policy existed in the Third Armored Division against servicemen offering favorable testimony at a court-martial in a defendant's behalf (Giarratano Tr. 827-828). The matter was brought to the attention of, and rectified by, the staff judge advocate, who regarded the matter as an isolated incident (McCallum Gov't C.A. Exh. 1, at 2). On February 28, 1983, however, the staff judge advocate became aware of a policy letter issued by the Third Armored Division command sergeant major, a subordinate of General Anderson, which discouraged noncommissioned officers from providing character

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[4] While no transcripts of General Anderson's remarks exist, the interpretations given his comments by those in attendance can be found in the testimony of witnesses and the exhibits filed in the course of subsequent litigation, particularly in the trial record in petitioner Giarratano's case. The military trial and appellate courts have extensively detailed the facts surrounding General Anderson's comments. These facts, and the effect they had on witnesses, are discussed in *United States* v. *Treakle*, 18 M.J. 646, 649-653 (A.C.M.R. 1984) (en banc), remanded, No. 47978 (C.M.A. Sept. 22, 1986).

testimony in a defendant's behalf (*ibid.*).[5] At General Anderson's direction, immediate steps were taken to correct any misperceptions stemming from his remarks and from the command sergeant major's policy letter (*ibid.*),[6] although those measures were later determined to have been ineffective (Giarratano Tr. 1444-1445).

On March 14, 1983, General Anderson was interviewed by nine attorneys from the Army Trial Defense Service regarding the comments attributed to him (Giarratano AX 65). When questioned about the purpose of his comments, General Anderson ex-

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[5] On January 25, 1983, Command Sergeant Major Haga issued Noncommissioned Officers Professionalism Program Letter 16, entitled Personal Conduct and Integrity (Giarratano AX 12). As an enclosure to the letter, Sergeant Haga provided a list of "do's and don'ts," one of which stated that noncommissioned officers do not "stand before a court martial jury * * * and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty" (*ibid.*). General Anderson did not see, review, or approve of that letter before it was issued, and he did not learn of its existence until March 1, 1983. *Treakle*, 18 M.J. at 651.

[6] The Army Court of Military Review explained in *Treakle* (18 M.J. at 652): "Attempts were made to stop further distribution of the letter. The staff judge advocate personally called subordinate commanders to advise them to disregard the letter and to expect a written retraction." At meetings with subordinate commanders and senior noncommissioned officers on three occasions in early 1983, the general emphasized that there was no policy against testifying favorably for accused persons at courts-martial and that any such impression created by previous statements or letters was erroneous. He also emphasized that there was a legal and moral obligation to testify favorably. The Division command sergeant major met with senior noncommissioned officers on March 10, 1983, and advised them to disregard that part of his letter involving testifying at courts-martial. *Ibid.*

plained that he found it inconsistent for a commander to recommend that a soldier be subjected to a court-martial at which he could receive a punitive discharge and subsequently to testify on the soldier's behalf that he should be kept in the Army (*id.* at 11). In addition, on March 4 and September 15, 1983, General Anderson issued command policy letters emphasizing the obligation to testify in an accused soldier's behalf (Giarratano AX 49-50).

Litigation over this matter soon followed.[7] On October 2, 1983, extensive litigation of the command influence issue began in the special court-martial of petitioner Giarratano.[8] After receiving and considering extensive evidence concerning Giarratano's command influence motion, the trial judge found that General Anderson was not disqualified from serving as the convening authority (Giarratano Tr. 1438). Nonetheless, the trial judge found that General Anderson's remarks amounted to unlawful command influence, in violation of Article 37, UCMJ, 10 U.S.C. 837 (Giarratano Tr. 1442, 1447). The trial judge found by clear and convincing evidence, however, that petitioner's chain of command was not affected by General Anderson's remarks (*id.* at 1447).

The command influence issue was also litigated in the case of petitioner Ivy (Pet. App. 42a-46a) and

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[7] See *United States* v. *Sherman*, 21 M.J. 787 (A.C.M.R. 1986) (tried Mar. 28, 1983); *United States* v. *Yslava*, *supra* (tried June 9, 1983); *United States* v. *Kennedy*, 21 M.J. 879 (A.C.M.R. 1986) (tried July 5, 1983).

[8] The trial lasted 14 days between October 2 and December 10, 1983, and involved 54 witnesses, 123 exhibits, and over 1400 pages of testimony, nearly all of which was devoted to the command influence issue.

others. In some cases, including that of petitioner Smith (Pet. App. 50a), defense counsel were aware of this issue, but elected not to raise it. Litigation of the issue continued even after General Anderson's departure from command in March 1984.

c. On June 29, 1984, the Army Court of Military Review in *United States* v. *Treakle*, 18 M.J. 646 (A.C.M.R. 1984), determined that General Anderson was not disqualified as an "accuser" from participating in the referral process (18 M.J. at 655). The court recognized that General Anderson had attempted to correct what he perceived to be a command influence problem, and it found that his original comments were "marked by confusing communication rather than deliberate attempts to pervert the military justice system" (*ibid.*). While recognizing that the interpretation given to General Anderson's remarks varied widely (*id.* at 650-651), the court determined that General Anderson's comments could reasonably have been understood to discourage servicemen from offering favorable character testimony in a defendant's behalf and therefore amounted to unlawful command influence, in violation of Article 37(a), UCMJ, 10 U.S.C. 837(a).[9] Subsequent liti-

[9] Article 37(a) provides, in pertinent part:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of

gation of the command influence issue in the Army Court of Military Review has resulted in 35 published opinions. That court and the Court of Military Appeals have awarded defendants some form of relief in all but 37 of the 219 cases reviewed to date.[10]

2. On September 22, 1986, the Court of Military Appeals, after noting the extensive remedial actions by the Army Court of Military Review, affirmed the convictions of petitioners Thomas, Cook, and Giarratano (Pet. App. 1a-19a). The Court of Military Appeals concluded that General Anderson had only an official interest in petitioners' trials and was therefore not disqualified from serving as the convening authority under Article 1(9), UCMJ, 10 U.S.C. 801(9) (Pet. App. 7a-8a). The Court of Military Appeals also concluded that the harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), rather than a rule of per se reversal, was appropriate in the case of unlawful command influence. Applying that standard, the Court of Military Appeals found beyond a reasonable doubt that the findings and sentences in the cases of petitioners Thomas, Cook, and Giarratano were not affected by command influence (Pet. App. 14a-16a). The court affirmed the convictions of the remaining petitioners

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any convening, approving, or reviewing authority with respect to his judicial acts.

[10] The relief granted included post-trial evidentiary hearings pursuant to *United States* v. *Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), to determine whether General Anderson's actions had any effect on a defendant's case; new post-trial reviews and actions by a different convening authority pursuant to Article 64(b), UCMJ, 10 U.S.C. (Supp. III) 864(b); rehearings as to sentence; new trials; sentence reassessments by the Army Court of Military Review; and remedial action by the Judge Advocate General.

on the basis of its decision in *Thomas* (Pet. App. 47a, 52a, 59a, 68a-69a, 76a, 83a, 92a, 104a).

ARGUMENT

This case demonstrates the ability and the willingness of the military justice system to discover and remedy instances of improper command influence. In a thoughtful and comprehensive opinion, the Court of Military Appeals conducted a careful examination of this unusual incident and its potential effects on courts-martial within the Third Armored Division. At the conclusion of that review, the court determined that the Army trial and appellate courts had taken the necessary steps to ensure that no servicemember was denied a fair trial.[11] The decision

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[11] In each of petitioners' cases, the Army Court of Military Review and the Court of Military Appeals specifically found that the relief granted was sufficient to cure any prejudice arising from General Anderson's comments, or that no relief was warranted.

Petitioners Thomas, Thompson, Holmes, and Jones were given rehearings as to their sentence and new post-trial reviews by a different convening authority (Pet. App. 14a, 23a-24a, 26a, 56a, 59a, 79a, 82a; 86-825 Pet. App. 24a). Petitioners McCallum, Schlote, Shepherd, and Ware received new post-trial reviews and actions by a different convening authority (*id.* at 72a, 89a, 95a; 86-825 Pet. App. 28a). Petitioner Defibaugh received a post-trial evidentiary hearing pursuant to *Dubay* to determine whether General Anderson's remarks had any effect on his case. The hearing showed that the remarks did not affect Defibaugh's trial (*id.* at 63a-64a, 66a-67a, 68a). Petitioner Cook had his sentence reassessed by the Army Court of Military Review, resulting in his not receiving a bad conduct discharge (*id.* at 30a). Petitioner Ivy litigated this issue at trial, and the trial judge rejected his motion to dismiss the charges. The Army Court of Military Review found that General Anderson's actions did not affect Ivy's convictions on the charge as to which he had pleaded guilty, but

of the Court of Military Appeals, upon which we largely rely, is correct and does not warrant further review. Moreover, that court's resolution of statutory and procedural issues unique to the military justice system is entitled to considerable deference by this Court. Finally, the relief afforded by the courts below is sufficient to cure any prejudice petitioners could have suffered. Accordingly, further review is not warranted.

1. Petitioners contend (86-826 Pet. 11-18) that General Anderson should have been disqualified from acting as the convening authority in their cases on the ground he was an "accuser" within the meaning of Articles 22(b) and 23(b), UCMJ, 10 U.S.C. 822(b) and 823(b). That claim lacks merit.

The question whether an officer is an "accuser" is entirely a matter of statutory construction. Articles 22 and 23, UCMJ, 10 U.S.C. 822 and 823, list the persons who may convene a general or special court-martial. Articles 22(b) and 23(b) provide that, if an officer is an "accuser," he may not order a general or a special court-martial, and a superior officer shall instead make that decision. The term "accuser" is defined in Article 1(9), UCMJ, 10 U.S.C. 801(9); it includes any person who signs and swears to charges, any person who directs that charges be signed and sworn to by another, and "any * * * per-

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the court dismissed Ivy's conviction on the charge as to which he had been convicted after pleading not guilty (*id.* at 54a-46a). Petitioner Giarratano litigated the issue at trial. The trial judge ordered that certain remedial action would be taken to offset any prejudice, including post-trial review by a different convening authority (*id.* at 16a, 34a-36a). Only petitioner Smith received no relief. Smith, however, declined to raise the issue at trial " 'for ta[c]tical and strategic purposes' " (*id.* at 50a, 52a).

son who has an interest other than an official interest in the prosecution of the accused" (Pet. App. 7a).

The Court of Military Appeals has consistently interpreted the term "accuser" to disqualify only those officers who have a personal interest in the outcome of the case. The leading case construing that term is *United States* v. *Gordon*, 1 C.M.A. 255, 2 C.M.R. 161 (1952). There, the Court of Military Appeals analyzed Article 8 of the Articles of War, 10 U.S.C. (1946 ed.) 1479, the statutory predecessor to Articles 1(9), 22(b), and 23(b) of the UCMJ. Article of War 8 provided that, when a commander authorized to appoint a general court-martial was the accuser of the person to be tried, the court was to be appointed by a superior competent authority. After examining the origin and history of that standard,[12] the Court of Military Appeals concluded that a convening authority was disqualified as an "accuser" when, on the facts and circumstances of the case, he was so closely connected to the offense that "a reasonable person would impute to him a personal feeling or interest in the outcome of the litigation" (*Gordon*, 1 C.M.A. at 260, 2 C.M.R. at 166). Since its decision in *Gordon*, the Court of Military Appeals has consistently applied that standard to determine whether a convening authority was disqualified from referring a case to trial.[13]

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[12] For example, in 1918 the Attorney General concluded that an "accuser" should not have "any personal feeling or interest in the conviction of the [accused]." 16 Op. Atty Gen. 106, 110, quoted in *Gordon*, 1 C.M.A. at 259, 2 C.M.R. at 165.

[13] See, *e.g.*, *United States* v. *Corcoran*, 17 M.J. 137, 138 (C.M.A. 1984); *United States* v. *Crossley*, 10 M.J. 376, 378 (C.M.A. 1981); *United States* v. *Cansdale*, 7 M.J. 143, 145

The Court of Military Appeals correctly applied the standard adopted in *Gordon* to petitioners' cases. Nothing in General Anderson's remarks supports the claim that he had a personal interest in the outcome of any of these cases. As the Court of Military Appeals explained (Pet. App. 7a), General Anderson was not the victim of a crime (*United States* v. *Gordon*, *supra*) or the person who gave an order that was willfully disobeyed (*United States* v. *Corcoran*, 17 M.J. 137 (C.M.A. 1984)). Rather, his remarks were directed to what he perceived as a general practice followed by unit commanders, not to the facts of any particular case. Those remarks would not lead a reasonable person to conclude that General Anderson had an interest in seeing any particular servicemember prosecuted or sentenced in any particular manner.

Petitioners contend (85-826 Pet. 11-18) that the Court of Military Appeals adopted an unduly narrow construction of Article 1(9), and they claim that General Anderson should have been disqualified under that Article because he was "impliedly biased." As the convening authority responsible for referring cases to courts-martial, General Anderson performed the same role that the grand jury serves in the civilian justice system. He should have been disqualified from performing that role, petitioners argue, because his views on character evidence rendered him unable to make an unbiased decision whether to refer the charges against them to a court-martial. That argument is flawed in several respects.

(C.M.A. 1979); *United States* v. *Conn*, 6 M.J. 351, 354 (C.M.A. 1979); *United States* v. *Reed*, 2 M.J. 64, 68 (C.M.A. 1976); *Brookins* v. *Cullins*, 23 C.M.A. 216, 218, 49 C.M.R. 5, 7 (1974); *United States* v. *McClenny*, 5 C.M.A. 507, 511, 18 C.M.R. 131, 135 (1955).

To begin with petitioners' analogy is flawed. A convening authority is not the factfinder; instead, his role during the referral and pretrial process has been compared to that of a prosecutor. See *Cooke* v. *Orser*, 12 M.J. 335, 343 (C.M.A. 1982); *United States* v. *Hardin*, 7 M.J. 399, 404 (C.M.A. 1979); *United States* v. *Yslava*, 18 M.J. 670, 674 (A.C.M.R. 1984). The appropriate parallel, therefore, is not to a claim that the factfinder was impliedly biased, but to the claim that the prosecutor was animated by an invidious motive. See *Wayte* v. *United States*, 470 U.S. 598 (1985). Petitioners have not made that claim, however, and General Anderson's remarks would not support such a claim if it had been made.

In addition, 11 of the 13 petitioners pleaded guilty to the crimes for which they were convicted (page 2 note 2, *supra*) and therefore may not claim that their convictions should be reversed on this ground. See *Tollett* v. *Henderson*, 411 U.S. 258 (1973) (guility plea waives claim of grand jury discrimination).[14] The two remaining petitioners (Giarratano and McCallum) had an opportunity to demonstrate that General Anderson was actually

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[14] The Army Court of Military Review found (where the claim was raised) that petitioners' decisions to plead guilty were not affected by General Anderson's remarks, and the Court of Military Appeals upheld the decisions of the Court of Military Review (86-825 Pet. App. 21a, 22a, 24a, 28a; 86-826 Pet. App. 14a, 23a, 31a, 44a-45a, 47a, 50a, 52a, 55a, 59a, 67a, 68a, 79a, 82a, 83a, 87a, 92a, 101a, 104a). The Court of Military Appeals also found (Pet. App. 10a) no evidence that General Anderson intended by his actions to induce guilty pleas. And none of these petitioners has argued in this Court that his guilty plea was coerced by General Anderson's actions or was inaccurate in any respect. Accordingly, these petitioners have waived their claim of implied bias.

biased against them, and the opportunity to make such a showing is all that due process generally requires (see *Smith* v. *Phillips*, 455 U.S. 209 (1982)). In their cases, the courts below found that General Anderson's actions had no effect on the outcome of their trials (Pet. App. 16a, 35a-36a, 74a, 76a). There is no evidence that General Anderson harbored any prejudice of any type towards petitioners, or that he was even aware of them before their cases were presented to him in his capacity as convening authority for referral to a court-martial. Petitioners do not argue to the contrary.

Finally, even assuming that the decision of a convening authority to refer a case to a court-martial should ever be set aside on the ground that he was impliedly biased (but cf. *United States* v. *Mechanik*, No. 84-1640 (Feb. 25, 1986); *Beck* v. *Washington*, 369 U.S. 541, 548-549 (1962) (requiring the defendant to establish actual bias on a claim that his conviction should be reversed because the grand jury was exposed to prejudicial publicity)), petitioners have failed to demonstrate that this is an appropriate case in which to adopt such a rule.[15] There is no allegation in any of these cases that charges were inappropriate or were unsupported by the evidence presented to General Anderson. Nothing in his statements suggests that General Anderson had prejudged petitioners' guilt or had referred their cases

[15] Petitioners also argue (86-826 Pet. 22-24) that command influence should be subjected to the same standard of review as racial prejudice in a grand jury proceeding (*Rose* v. *Mitchell*, 443 U.S. 545 (1979)). The policy against unlawful command influence does not rise to that level. Cf. *United States* v. *Mechanik*, slip op. 5 n.1.

to a court-martial for an improper reason.[16] Furthermore, unlike the case in which the convening authority is the victim of a crime, there is no reason to presume that General Anderson was incapable of

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[16] The incidents that petitioners use (86-826 Pet. 6-7) to illustrate General Anderson's intense interest in military justice do not relate to any of petitioners' cases. Furthermore, the incidents referred to do not reflect any personal interest in the outcome of any case, or bias on General Anderson's part. The first incident, which involved a sergeant driving under the influence of alcohol and leaving the scene of an accident, occurred during one of many routine unannounced inspections conducted by General Anderson (Giarratano Tr. 1077). Prior to inspecting the barracks area, General Anderson asked to see the battalion vehicle registration book (*id.* at 1078). When General Anderson discovered that the vehicle the sergeant was driving when he had the accident was not listed in the book, he concluded that the chain of command was not doing its job, and he chastised the first sergeant (*id.* at 1078-1079). General Anderson did not attempt to influence the chain of command to take any disciplinary action against the sergeant or to communicate to anyone that he should not testify on the sergeant's behalf if he were to be court-martialed (*id.* at 1078-1080).

The second incident involved an inquiry by General Anderson to the chain of command regarding a Sergeant Fanning, whose name appeared on the military police blotter (a daily chronological record of police activity) for the third or fourth time (Giarratano Tr. 446). The sergeant major of Fanning's unit answered the phone, and General Anderson ascertained from him that one of Sergeant Fanning's prior blotter entries involved adultery, and that his current problems involved drugs (*ibid.*). Thereafter, General Anderson expressed his concern that an individual repeatedly in trouble should still hold the rank of sergeant—traditionally a rank associated with leadership and responsibility (*ibid.*). The sergeant major went on to testify that he felt his commander was never pressured by General Ander-

reviewing the evidence in an impartial manner to decide whether petitioners should be tried. In fact, that is precisely the type of inquiry that the courts performed to determine whether General Anderson

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son into taking any action in that case, or in any other case (*id.* at 457-458).

The other incidents referred to by petitioners involve contact between General Anderson's legal advisor and the commander of a military police unit. Petitioners quote liberally from the MP commander's affidavit but fail to note that the legal advisor answered those allegations in an affidavit of his own (Thomas Gov't C.A. Exh. 4). The legal advisor categorically denied that General Anderson ever told him he was displeased with the testimony of the commander, or that he ever told the commander General Anderson had said that he was upset (*id.* at paras. 9(f) and (g)). Likewise, the legal advisor unequivocally stated the commander was "wrong" when he said the legal advisor communicated General Anderson's displeasure at the retention and non-classification of a soldier who was court-martialed (*id.* at para. 10(b)). The legal advisor explained that he made several calls to the MP commander to explain to him that Army regulations required the soldier to be reclassified because the soldier had been convicted and could no longer be a military policeman (*id.* at para. 10(e)). Finally, the legal advisor stated that much of the conversation between the advisor and the MP commander revolved around the MP commander's dissatisfaction with the disposition of some court-martials, and did not involve General Anderson's views at all (*id.* at paras. 7(d) and 9(b)).

Notably, the discrepancies between the affidavits of the legal advisor and the MP commander were extensively litigated in a Third Armored Division case, *United States* v. *Thompson*, 19 M.J. 690 (A.C.M.R. 1984), new review and action ordered, CM 444070 (A.C.M.R. Oct. 9, 1986). In a limited hearing on the command influence ordered by the Army Court of Military Review, the military judge heard the respective contentions of the parties concerning the affidavits, reviewed the evidence, and entered special findings. The military judge found that the affidavit and supporting

should have been disqualified under Article 1(9) as an "accuser." And, as the extensive litigation in this case makes clear, there is no reason to conclude that an evidentiary hearing was inadequate to determine whether General Anderson was actually prejudiced against petitioners.

2. Petitioners also contend (85-825 Pet. 15-24; 85-826 Pet. 18-26) that they were denied the right to a fair trial by the actions of General Anderson and his subordinates. Petitioners do not argue that the relief awarded in the post-trial proceedings ordered by the Army Court of Military Review was inadequate to ensure that they were not prejudiced. Rather, the gravamen of petitioners' argument is that the only way to ensure the elimination of the command influence prohibited by Article 37 of the UCMJ, 10 U.S.C. 837, is to adopt a rule of per se reversal for every case in which a commanding officer violates Article 37 in some manner. The Court of Military Appeals therefore erred, petitioners contend, by applying the constitutional harmless error standard of *Chapman* v. *California*, 386 U.S. 18 (1967), instead of reversing every conviction without inquiry into the question of prejudice. That argument lacks merit, for several reasons.

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memoranda proposed by the MP commander "are summarizations, conclusions and perceptions he admitted may be wrong" (Special Findings (B)(6), at 4). The judge also found that "[a]t no time" did the legal advisor state to the MP commander "that MG Anderson was upset with [the MP commander's] testimony. The offending statements attributed to [the legal advisor] and implicitly to General Anderson were the conclusions of [the MP commander] based on philosophical concepts and a rehash of [a previous] case" (Special Findings (B)(4)).

First, the Court of Military Appeals' decision to apply the *Chapman* harmless error standard is fully consistent with congressional intent. Congress did not intend that all instances of command influence in violation of Article 37 should result in reversal without regard to whether the accused had been prejudiced. Like the federal criminal justice system, the military system has a harmless error statute, Article 59(a), UCMJ, 10 U.S.C. 859(a). That statute expressly provides that an error not affecting the substantial rights of a servicemember must be disregarded, and it does not treat violations of Article 37 differently from other types of errors. Compare 28 U.S.C. 2111. The legislative history of Article 59(a) discloses that it was adopted to permit a reviewing court "to sustain a finding of guilty even though error had been committed when it can be determined that the error does not materially prejudice the substantial rights of the accused" (S. Rep. 486, 81st Cong., 1st Sess. 25 (1949)). It is therefore not surprising that the courts have consistently looked to whether the defendant was prejudiced by command influence. See, *e.g.*, *United States* v. *McClain*, 22 M.J. 124 (C.M.A. 1986); *United States* v. *Dubay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).[17]

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[17] The cases cited by petitioner are not to the contrary. See *Engels* v. *United States*, 678 F.2d 173, 175 (Ct. Cl. 1982) (burden to show prejudice on an officer evaluation report resulting from command influence is on the claimant); *Calley* v. *Callaway*, 519 F.2d 184, 216 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) (command influence raised but defense unable to present a "colorable showing" that any officers involved in the trial process were affected); *Homcy* v. *Resor*, 455 F.2d 1345, 1352-1356 (D.C. Cir. 1971) (command influence infected sentencing procedure; specific prejudice noted and relief granted).

Second, the decision below is fully consistent with this Court's decisions. As the Court of Military Appeals recognized (Pet. App. 13a), the most likely effect of General Anderson's remarks would have been to discourage servicemembers from offering favorable testimony in support of an accused at trial or sentencing. This Court has refused to adopt a rule of per se reversal in a variety of similar contexts when a defendant is denied the opportunity to offer potentially exculpatory evidence.[18] Moreover, as the Court explained last Term in *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 7-8, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." Those conditions were satisfied in these cases. Petitioners do not claim that General Anderson's remarks affected the trial judges or their defense counsel. In fact, Congress and the military have taken steps to ensure that trial judges and defense counsel are insulated from command influence.[19]

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[18] See, *e.g.*, *Crane* v. *Kentucky*, No. 85-5238 (June 9, 1986), slip op. 9 (denying a defendant the right to testify regarding the circumstances of his confession can be harmless); *Delaware* v. *Van Arsdall*, No. 84-1279 (Apr. 7, 1986), slip op. 8-11 (denying a defendant the right to impeach a witness for bias can be harmless); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 872-874 (1982) (a defendant must show that a witness deported by the government would have provided favorable testimony to establish a constitutional violation); *Rugendorf* v. *United States*, 376 U.S. 528, 534-536 (1964) (failure to disclose informant's identity does not require reversal in the absence of prejudice).

[19] Military judges are insulated from the convening authority or any member of his staff. Under 10 U.S.C. (Supp. III) 826(c), an individual who is certified and qualified for

Third, there was no need for the Court of Military Appeals to adopt a rule of per se reversal in the exercise of its supervisory powers to deter a pattern of intentional lawlessness that could not be remedied in any other manner. General Anderson's actions were neither a deliberate attempt to disrupt the court-martial process nor part of a systematic effort to deny defendants in the Third Armored Division the opportunity to present favorable testimony at trial. As the Army Court of Military Review concluded in *Treakle* (18 M.J. at 655), "General Anderson's actions were marked by confusing communication rather than deliberate attempts to pervert the military justice system." Moreover, the Army and the Army Court of Military Review took numerous steps to reduce the effects of General Anderson's unfortunate remarks on the court-martial process and to remedy any prejudice that a servicemember may have suffered. Petitioners have failed to explain why these steps were insufficient to ensure that they received a fair trial.[20]

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duty as a military judge may perform such duties only when he or she is assigned and directly responsible to the Judge Advocate General or his designee. Notably, 75% of the 219 trials involving this particular command influence issue were tried before a military judge alone.

Moreover, since November 1980 all Army defense counsel have been part of an independent organization, the United States Army Trial Defense Service. See Dep't of Army Reg. 27-10, para. 6-2 (Sept. 25, 1986). As a result, all Army defense counsel are professionally insulated from any adverse consequences of their zealous representation of clients.

[20] Petitioners' contention (86-825 Pet. 18-20; 86-826 Pet. 25 n.33) that command influence is a serious threat to the military justice system that can be remedied only by a rule of per se reversal is contradicted by the cases they cite. The

Articles 1(9) and 37(a) of the Uniform Code of Military Justice are unambiguous and have been given meaningful effect by the military court system. The remedies provided by the military courts on a case-by-case basis are indicative of the military's ability to deal effectively with the problem of command influence. In fact, contrary to the image of military justice presented in the petitions (86-825 Pet. 18-19; 86-826 Pet. 21-22), the extensive litigation of the unlawful command influence issue by the courts below demonstrates the ability of the military justice system to police itself and to correct instances of unlawful command influence when they arise. At every stage in this litigation, from discovery of the problem by members of the Army's independent Trial Defense Service, to litigation at the trial level before members of the independent trial judiciary, to review in the military appellate courts, petitioners have been ably served by a system designed to assure the fairness of their individual trials. These courts have concluded that petitioners were not prejudiced by the isolated and unfortunate incidents that gave rise to these cases. Further review is not warranted.

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decisions by the military courts in those cases indicate that the case-by-case determination whether a defendant has been prejudiced is an effective safeguard against unlawful command influence.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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